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Recent Cases

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CONSTITUTIONAL LAW—PENNSYLVANIA LIQUOR CONTROL BOARD'S LICENSING OF A PRIVATE CLUB IS NOT SUFFICIENT STATE ACTION UNDER EQUAL PROTECTION CLAUSE

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)

In *Moose Lodge No. 107 v. Irvis*,[1] the United States Supreme Court held that the regulatory functions of the Pennsylvania Liquor Control Board do not involve the state in the discriminatory practice of a private club to a sufficient extent to constitute "state action" within the scope of the equal protection clause of the fourteenth amendment.[2]

On Sunday, December 29, 1968, K. LeRoy Irvis, Majority Leader of the State House of Representatives, and three of his House colleagues were brought to the Moose Lodge's dining room as the guests of Harry A. Englehart, Jr. The Lodge's employees refused their request for a service of food and beverages solely because Irvis is a Negro.[3]

Moose Lodge No. 107 is a private club[4] and holds a club liquor license issued by the Liquor Control Board of the Commonwealth

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1. 407 U.S. 163 (1972).
2. *Id.* at 177.
3. *Id.* at 165.
4. The parties stipulated the definition of Moose Lodge No. 107 as:
> . . . a local chapter of a national fraternal organization having well defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee.

407 U.S. at 171.

of Pennsylvania. Irvis commenced action[5] against the Lodge and the Liquor Control Board in federal district court[6] to determine whether the issuance or renewal of the Lodge's club liquor license by the Liquor Control Board violated the fourteenth amendment's equal protection clause.[7]

The three judge court[8] held that the Lodge's discriminatory acts constituted state action as a result of the "uniqueness and all-pervasiveness"[9] of the Commonwealth's licensing of the liquor trade.[10] The Court also found that the Liquor Control Board's regulations required that "every club licensee shall adhere to all the provisions of its constitution and by-laws."[11] Since the national organization's constitution limits membership to white

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5. Irvis v. Scott, 318 F. Supp. 1246, 1247 (M.D. Pa. 1970).

6. Jurisdiction was vested in the federal courts by 42 U.S.C. § 1983 (1970).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. U.S. CONST. amend. XIV, § 1.

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction equal protection of the laws.

8. Convened under the provisions of 28 U.S.C. § 2281 (1965):

> An interlocutory or permanent injunction restraining the enforcement, operation, or execution . . . of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges. . . .

9. 318 F. Supp. at 1248.

10. The late Circuit Judge Freedman, writing for the three judge panel extensively discussed the distinction between other licensees of the state, where the state's interest in the licensee's actions is minimal and not of a continuing nature and the holder of a state liquor license where the state's concern is constant and pervasive:

> The issuance or refusal of a license to a club is in the discretion of the Liquor Control Board. In order to secure one of the limited licenses which are available in each municipality an applicant must comply with extensive requirements. . . . It is only on compliance with these . . . requirements and if the Board is satisfied that the applicant is 'a person of good repute' and that the license will not be detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood, that the license may issue. . . . Liquor licenses have been employed in Pennsylvania to regulate a wide variety of moral conduct, such as the presence and activities of homosexuals, performance by a topless dancer, lewd dancing, swearing, being noisy or disorderly. . . .
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> These are but some of the many reported illustrations of the use which the state has made of its unrestricted power to regulate and even deny the right to sell, transport or possess intoxicating liquor. . . . Here by contrast beyond the act of licensing is the continuing and pervasive regulation of the licensees by the state to an unparalleled extent.

Id. at 1249-50 (footnotes omitted).

11. REGS. OF THE PA. LIQUOR CONTROL BD. § 113.09 (June 1970).

males,[12] the state would be requiring the Lodge to adhere to its discriminatory clause under penalty of loss of its license.[13] The district court subsequently entered a decree "declaring invalid the liquor license issued to Moose Lodge 'as long as it follows a policy of racial discrimination in its membership or operating policies or practices.' "[14]

The Liquor Control Board chose not to appeal, so Moose Lodge alone urged the Supreme Court to either vacate the lower courts judgment or alternatively to reverse on the merits.[15] The appellant Lodge contended that Irvis, by refusing to accept the Lodge's motion to modify[16] the final decree, which would have permitted Irvis to be brought to the Lodge's premises as a guest, effectively disclaimed any interest in obtaining relief based on the Lodge's guest policies thereby rendering his claim moot.[17] The Supreme Court rejected this argument and the appellant's request to vacate stating that:

> [N]othing less than an explicit renunciation of any claim would justify our concluding that there was no longer any case or controversy with respect to Moose Lodge's practices in serving guests of members.[18]

In order to clarify the Supreme Court's reasoning in *Moose Lodge No. 107 v. Irvis*, a brief synthesis of the development of the concept of state action and its application to the equal protection clause is necessary. The distinction between state action and individual action arose subsequent to the passage of the 1875 Civil Rights Act[19] and was best articulated in *The Civil Rights Cases*:[20]

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12. 318 F. Supp. at 1247.
13. *Id.* at 1250.
14. 407 U.S. at 165.
15. *Id.*
16. *Id.* (As a result of appellee's opposition the district court denied the motion).
17. *Id.* at 168.
18. *Id.* at 170. Before discussing the primary issue of whether state action existed in this case, the Court also dispensed with the question of Irvis' standing to litigate the discriminatory aspects of the Lodge's membership requirements. Since Irvis did not apply for membership the Court found he had no "standing" to litigate these requirements since his injury was not a result of the Lodge's discriminatory membership requirements. The Court therefore decided that the lower court exceeded its jurisdiction by issuing a decree restricting the Lodge's membership requirements.
19. Ch. 114, 18 Stat. 335.
20. 109 U.S. 3 (1883). *The Civil Rights Cases* was a collection of five actions, four brought by the United States against two individuals for denying Negroes the accommodations of an inn and against two others for denying Negroes the accommodations of a theatre. The fifth action was brought by a party whose wife was denied service of a railroad because

> Until some state law has been passed or some State action through its officers or agents has been taken adverse to the rights of citizens sought to be protected under the fourteenth amendment, no legislation of the United States under such amendment . . . can be called into activity.[21]

The Court also held that an individual's wrongful acts cannot impair the civil rights of another when those acts are not supported by state authority in the form of laws, actions or judicial or executive proceedings.[22]

For sixty-five years *The Civil Rights Cases*' explication of the concept of state action remained unmodified. In *Shelly v. Kraemer*,[23] the United States Supreme Court redefined the criteria for the determination of the existence of state action. The state or its agencies no longer had to initiate the discriminatory act. The *Shelley* Court held that a state judiciary's enforcement of a discriminatory covenant in an agreement for the sale of real property constituted state action within the equal protection clause of the fourteenth amendment.[24] The Court stated that:

> [The fourteenth amendment is not] ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action . . . refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.[25]

The tacit authorization of discriminatory acts by state law also constitutes state action for purposes of the equal protection clause. In *Reitman v. Mulkey*,[26] the neutral wording of a state constitu-

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of her color. All of the actions were based on Sections One and Two of the 1875 Civil Rights Act which provided in part:

> . . . [A]ll persons . . . shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color. . . .

Section Two provided for criminal sanctions enforceable by the United States, or alternatively, actions by the aggrieved party to recover statutory damages of $500 for violations of Section 1.

The Court held the law to be unconstitutional because it exceeded the purview of the fourteenth amendment by regulating individual action as well as state action.

21. 109 U.S. at 13.
22. *Id.* at 17.
23. 334 U.S. 1 (1948).
24. *Id.* at 20.
25. *Id.*
26. 387 U.S. 369 (1967). In *Reitman*, the Mulkey's brought suit under anti-discrimination statutes of the California Civil Code (§ 51 and § 52) which created, *inter alia*, a cause of action for actual damages suffered by a person denied the rights of equal accommodations because of racial discrimination. The defendants responded that these statutes were a violation of the recently enacted amendment to the California Constitution (Art. I, § 26) which provided in part: "Neither the State nor any . . . agency

tional provision was found not only to repeal anti-discrimination statutes, but also, in effect, to authorize racial discrimination in the housing market.[27] State action was found to exist when the potential impact of the state's act is discriminatory. The fact that the act on its face appears inoffensive to the equal protection clause has no significance. Thus a tacit authorization of racial discrimintion was held sufficient to render the provision unconstitutional.

State inaction also has been found to violate the equal protection clause. In *Burton v. Wilmington Parking Authority*[28] a privately operated restaurant located in a building owned by a state agency refused service to a black solely because of his race. The Supreme Court held that the state agency's refusal to exercise its authority to compel its lessee to cease its discriminatory practices was a violation of the equal protection clause.

> The [Wilmington Parking] Authority, . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [the lessee] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment.[29]

In summarizing the historical development of the concept of state action under the equal protection clause, it is apparent that, although the state must be involved in the discriminatory act in some form in order to invoke fourteenth amendment protections, the definition of state action has been sufficiently broadened to encompass virtually all discriminatory acts where the state is marginally involved. If a private party's discriminatory act arises from rights which the state has granted him, and the state, having the power to remove or modify those rights, fails to do so, a violation of the guarantees of the equal protection clause occurs.

The development of the concept of state action to include individual acts under the aegis of state authority was not utilized by the majority opinion in *Moose Lodge No. 107 v. Irvis*. Mr. Justice Rehnquist, speaking for the majority, reverted to the dichotomy between a state and individual acts created by *The Civil Rights Cas-*

. . . shall deny . . . the right of any person . . . to decline to sell, lease, or rent such [real] property to such persons as he, in his absolute discretion, chooses."

27. 387 U.S. at 381.
28. 365 U.S. 715 (1961).
29. *Id.* at 725.

es, declining to confront that landmark holding's subsequent redefinition by *Shelly v. Kraemer, Burton v. Wilmington Parking Authority*, and *Reitman v. Mulkey*. The Court distinguished the instant case from *Burton*, a case heavily relied upon in the district court's decision on the basis of two factors: first, in *Burton* the lessor, Eagle, "was a public restaurant in a public building; Moose Lodge is a private social club in a private building,"[30] and second, a lessor-lessee relationship existed in *Burton* but a licensor-licensee relationship existed in *Moose Lodge*.[31] However, there are three important similarities between the two cases that the Court did not note in its discussion. In both *Moose Lodge* and *Burton*, there was no inference that the Liquor Control Board's regulation, nor the Parking Authority's lease is intended "either to overtly or covertly encourage discrimination."[32] Second, neither the Liquor Control Board nor the Parking Authority played any part in the discriminatory operational policies of its licensee or lessee. These two circumstances were acknowledged by the Court in the instant case, but it failed to note the similarities with *Burton*. Finally, in both cases the state agencies had the power over their respective licensees and lesses to make non-discriminatory conduct a condition to the continuation of their relationships.

The majority opinion's distinction between *Burton* and the instant case may be reduced to the proposition that the existence of a lessor-lessee relationship made the state responsible for the actions of its lessees, whereas a licensor-licensee relationship was unable to sustain the concept of state action. The Court failed to state that the *Burton* Court did not hinge its decision on the *existence* of a lessor-lessee relationship, but on the power the Parking Authority had over Eagle *in establishing* this relationship. The Authority's failure to use this power to prevent discriminatory practices was the state action in issue and not the relationship in itself.[33]

The Court also deemphasized the "pervasive" nature of the Liquor Control Board's regulations, a point stressed heavily by the district court.[34] Again Mr. Justice Rehnquist discussed the nature of the relationship rather than the authority that the state held in the operations of licensed private clubs.[35] The Liquor Con-

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30. 407 U.S. at 175.
31. *Id.*
32. *Id.* at 173. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).
33. [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.

365 U.S. at 725. For further discussion on this interpretation of state action see Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 481-87 (1962).
34. *See* note 10 *supra*.
35. However detailed this type of regulation may be . . . it

trol Board, through the continuous regulation of its licensees, has the power to compel private clubs to discharge state responsibilities arising under the fourteenth amendment and this power is comparable to that of the Parking Authority over its lessees after it had executed a twenty year renewable lease. Clearly the rationale[36] of *Burton* should have been applied in *Moose Lodge.*

Distinguishing the facts of *Burton* from those at bar, the Court declined to consider the implications of the substantial similarities between the two cases and reversed the district court's decision subject to the following exception. The Court found that the Liquor Control Board's regulation[37] requiring the Lodge to adhere to *all* provisions of its constitution, including those discriminatory guest and membership provisions contained therein, did involve the state contrary to the equal protection clause in the Lodge's discriminatory practice. It was therefore determined that the Liquor Control Board should be enjoined from enforcing this requirement insofar as it compels that the Lodge comply with the discriminatory provisions of its constitution.[38]

Mr. Justice Douglas, in a dissenting opinion, noted that the Liquor Control Board uses a quota system[39] to determine the number of liquor licenses available in each municipality. The maximum number of licenses permitted in Harrisburg, the municipality in which Moose Lodge No. 107 is located, has been met for many years. Justice Douglas argued that in order for a nondiscriminatory club to obtain a license, it must purchase one from an existing club which can charge any price it pleases.[40] A license held by a discriminatory club such as the Moose Lodge is thus held to the exclusion of any potential nondiscriminatory club. Therefore, contended Mr. Justice Douglas, "The State of Pennsylvania is putting the weight of its liquor license, concededly a valued and important adjunct to a private club, behind racial discrimination."[41]

> cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

407 U.S. at 176-77.

36. *See* note 33 *supra.*

37. ". . . [E]very club licensee shall adhere to all the provisions of its constitution and by-laws." REGS. OF THE PA. LIQUOR CONTROL BD. § 113.09 (June 1970).

38. 407 U.S. at 179.

39. Basically each municipality has a statutory quota of one retail license for each 1,500 inhabitants. Once the quota is filled, no additional licenses may be issued. *Id.* at 176.

40. *Id.* at 183.

41. *Id.* Moose Lodge No. 107 conceded that without a liquor license it would be hard pressed to survive.

This point, argued Mr. Justice Douglas, coupled with the invidious discriminatory nature of the appellant's practices under the aegis of the Liquor Control Board constituted "state action" in violation of the equal protection clause of the fourteenth amendment.[42]

In dissent, Mr. Justice Brennan concurred with the lower court's finding that the liquor license laws are "primarily pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the licensee's business."[43]

Moose Lodge No. 107 v. Irvis was not entirely resolved with the decision of the United States Supreme Court. On July 31, 1972, the Supreme Court of Pennsylvania held[44] that the Moose Lodge dining room and bar is a place of public accommodation for guests of members.[45] As such Moose Lodge violated a mandate of the Pennsylvania Human Relations Act[46] not to engage in discriminatory practices. The court ordered the Lodge to cease from refusing service in the bar and dining room on the basis of race so long as it is open to non-members or any portion of the general public.[47]

These two decisions, when viewed together, conclude that private clubs admitting non-members are prohibited from discriminatory practices, but private clubs admitting members only are permitted to discriminate in their membership policies without jeopardizing their liquor licenses.

Moose Lodge No. 107 v. Irvis represents a halt in the trend of decisions[48] which had broadened the scope of state action. *Moose Lodge* reaffirmed the ostensibly outmoded dichotomy between state and individual action outlined in *The Civil Rights Cases*.[49] *Burton v. Wilmington Parking Authority*,[50] a decision in the forefront of the extension of the state action concept and heavily re-

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42. 407 U.S. at 185.

43. *Id.*

44. Pennsylvania Human Relations Comm'n v. Loyal Order of Moose Lodge No. 107, 448 Pa. 451, 294 A.2d 594, *rev'g* 220 Pa. Super. 356, 286 A.2d 374 (1971). The Superior Court decision, which held that Moose Lodge was not a place of public accommodation, was cited by the United States Supreme Court as one of its reasons for accepting the stipulation that the Lodge is a private club. The Court did, however, fail to note the pendency of the appeal and the possibility of reversal.

45. *Id.* at 458, 294 A.2d at 597.

46. PA. STAT. ANN. tit. 43, § 955 (Supp. 1972) provides in part:

> It shall be an unlawful discriminatory practice, . . . in the case of a fraternal corporation or association, unless based upon such membership in such association or corporation . . . for any person being the owner, lessee, proprietor, manager . . . of any place of public accommodation . . . to (1) refuse, withhold from, or deny to any person because of his race, color . . . either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such place of public accommodation. . . .

47. 448 Pa. at 456, 294 A.2d at 596.

48. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

49. *See* note 21 *supra*.

50. *See* note 30 and accompanying text *supra*.

lied upon in the lower court decision overturned by the Supreme Court, was distinguished on the basis that the licensor-licensee relationship of *Moose Lodge* was not sufficiently analogous to the lessor-lessee connection in *Burton* to invoke the application of that case to *Moose Lodge*. If the Moose Lodge reasoning is developed in subsequent cases, for example, where a state-regulated, privately-owned public utility commits a discriminatory act, it will lead to an erosion of the guarantees which the Supreme Court has previously drawn from the equal protection clause.

EARL H. DOUPLE, JR.

CONSTITUTIONAL LAW—THE PRESIDENT MAY NOT AUTHORIZE ELECTRONIC SURVEILLANCE IN DOMESTIC SECURITY CASES WITHOUT COMPLIANCE WITH FOURTH AMENDMENT REQUIREMENTS

United States v. United States District Court, 407 U.S. 297 (1972)

Since 1940 the President has assumed power to authorize electronic surveillance without prior judicial approval in situations where the national security is affected.[1] In *United States v. United States District Court,* the United States Supreme Court ruled such surveillance violative of the fourth amendment[2] where the nation's domestic security, as contrasted with threat from foreign power, is involved.[3] In an opinion by Mr. Justice Powell,[4] the Court held that the fourth amendment requires prior judicial approval of electronic surveillance no matter how reasonable it might seem to the executive branch.[5]

District Court originated in the pretrial maneuverings of a criminal proceeding against Lawrence Plamondon and two other defendants in the United States District Court for the Eastern District of Michigan, Southern Division.[6] The defendants were charged with conspiracy to destroy Government property. In ad-

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1. A letter from President Roosevelt to Attorney General Jackson dated May 21, 1940, reads in part:

> You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.

United States v. United States District Court, 444 F.2d 651, 670 (6th Cir. 1971).

2. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. 407 U.S. 297 (1972).

4. Mr. Justice Powell spoke for six members of the Court, including Mr. Justice Douglas, who also filed a concurring opinion. Mr. Chief Justice Burger concurred in the result without opinion. Mr. Justice White concurred in the judgment without reaching the constitutional issue. Mr. Justice Rehnquist took no part in the consideration or decision of this case.

5. 407 U.S. 297 (1972).

6. *Id.* at 299.

dition, Plamondon was charged with destruction of Government property.[7] During pretrial proceedings, Plamondon moved for an order to compel the United States to disclose records of the electronic surveillance it had conducted against him.[8] He also petitioned for a hearing to determine whether the evidence on which the indictment was based or which the Government planned to present at trial was tainted by illegally-obtained information.[9]

The Government responded with an affidavit from the Attorney General stating that the installation of wiretaps through which Plamondon's conversations had been intercepted had been expressly approved by the Attorney General to "gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."[10] The United States justified the surveillance as a reasonable exercise, through the office of the Attorney General, of the President's power to protect the national security.[11]

The district court found the surveillance in violation of the fourth amendment and ordered full disclosure to Plamondon.[12] However, it stayed the order to allow the Government to petition the United States Court of Appeals for the Sixth Circuit for a writ of mandamus to set aside the order.[13] After concluding it had jurisdiction,[14] the Sixth Circuit affirmed the order. It could find no constitutional authority to sanction an exemption from fourth amendment requirements.[15]

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7. 18 U.S.C. § 371 (1970).
8. 407 U.S. 297, 299 (1972).
9. The motion was based on the exclusionary rule, which prohibits the introduction of illegally obtained evidence and the fruit of such evidence. *See, e.g.*, Nardone v. United States, 302 U.S. 379 (1937) *aff'd on rehearing*, 308 U.S. 338 (1939); Weeks v. United States, 232 U.S. 383 (1914).
There was no question that Plamondon had standing, since the Government admitted that several of his conversations had been intercepted. For a discussion of standing requirements *see* Alderman v. United States, 394 U.S. 165 (1969).
10. United States v. United States District Court, 407 U.S. 297, 300 (1972).
11. *Id.* at 301.
12. *Id.*
13. United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971).
14. The Sixth Circuit had found the Government's petition for a writ of mandamus proper under 28 U.S.C. § 1651 (1970) because this was an "extraordinary case" in which "[g]reat issues are at stake for all parties concerned." 444 F.2d 651, 655 (1971).
15. United States v. United States District Court, 444 F.2d 651, 669 (6th Cir. 1971).

Before analyzing the Supreme Court's decision, a brief discussion of the historical background of executive prerogative to utilize wiretaps without prior judicial approval under the aegis of domestic security is necessary. The President's original assumption of authority to conduct warrantless electronic surveillance dates from a time when the fourth amendment's warrant clause[16] had not been held to cover this relatively new modification of the ancient practice of eavesdropping. The United States Department of Justice was not deterred by a provision of the Federal Communications Act of 1934 which prohibited interception of conversations by wiretapping and publication of information thereby received.[17] The Justice Department took the position that the law was not intended to apply to federal agents "obtaining necessary information in the public interest."[18]

For many years the leading case was *Olmstead v. United States*,[19] where the Supreme Court found two reasons for allowing Olmstead's conversations, intercepted by Government wiretaps, to be admitted into evidence. First, there had been no physical trespass on the defendant's property. The wiretaps had been installed on telephone lines running over public property, and no Government agent had breached the perimeters of Olmstead's office or residence.[20] Second, no tangible thing had been seized.[21] A conversation was held not to be a material thing, and the fourth amendment was found only to protect such things as "persons, houses, papers, and effects."[22] Under the *Olmstead* rule the Government needed no warrant to conduct electronic surveillance.

The physical trespass theory was given greater effect in *Goldman v. United States*,[23] where the Supreme Court allowed evidence obtained by installing a listening device on the wall of a room adjoining a defendant's office to be admitted although a warrant had neither been issued nor sought.[24]

It is apparent that although the Supreme Court never sanctioned wiretapping under presidential authorization, the slow death of the physical trespass doctrine permitted the Government to continue its practice of warrantless electronic surveillance. It also accounts for the thirty-year gap between the President's assumption

16. The warrant clause is the second half of the fourth amendment, which sets forth the requirements for a legal search: "probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

17. 47 U.S.C. § 605 (1962).

18. Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 197 (1954).

19. 277 U.S. 438 (1927).

20. *Id.* at 456.

21. *Id.*

22. *Id.* at 464.

23. 316 U.S. 129 (1942).

24. *Id.* at 134.

of authority and a Supreme Court ruling on constitutionality. Although disparaged in a 1961 case,[25] the doctrine was not ultimately abandoned until 1967, when the Court explicitly rejected *Olmstead* in *Katz v. United States*.[26] Not until the *Katz* declaration that the fourth amendment protects people rather than places did a sound basis for a constitutional challenge exist.[27]

In *Katz* a "bug" placed on the outside wall of a public telephone booth the defendant was known to use at a certain time each day to relay illegally betting information was held an unlawful search and seizure.[28] Mr. Justice Stewart, writing for the Court, said:

> [T]he fourth amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
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> . . . [A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.[29]

The *Katz* ruling left the Government with two strategies in the instant case: To find constitutional authority enabling the Supreme Court to escape application of the fourth amendment or, failing that, to persuade the Court that unusual and sensitive circumstances of domestic security investigations justify the creation of a new exception to the fourth amendment warrant requirement.[30] Predictably, the Government utilized both arguments.

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25. Silverman v. United States, 365 U.S. 505 (1961). Contrary to its *Goldman* decision, the Court said the fourth amendment's protection is not defined by what constitutes a trespass under local property law. *Id.* at 511.

26. 389 U.S. 347 (1967).

27. Shortly before its *Katz* decision, in Berger v. New York, 388 U.S. 41 (1967), the Supreme Court voided a New York statute permitting court-authorized eavesdropping for sixty day periods upon a showing of reasonable cause. The Court said the statute was "too broad in its sweep . . . resulting in a trespassory intrusion into a constitutionally protected area." The area protected was not a physically defined space, but rather the defendant's right to privacy. *Id.* at 44.

28. 389 U.S. 347, 351 (1967).

29. *Id.* at 351-53.

30. The Supreme Court has occasionally recognized exceptions to the warrant requirement where "they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction." United States v. United States District Court, 407 U.S. 297, 318 (1972).

The Supreme Court began its analysis of the Government's positions by searching for recognition of an inherent presidential authority to conduct warrantless surveillance in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[31] Congress, of course, could not confer a constitutional power on the President, but the Government contended that section 2511(3) was persuasive evidence that such a constitutional power did exist. Section 2511 reads in part:

> [Nothing] contained in this chapter [shall] be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.[32]

The Court discerned no support for the Government's argument in Title III. Although it found an "implicit recognition that the President does have certain powers in the specified areas" of protecting the nation from overthrow of the Government, the Court said the language of the statute is "essentially neutral" so far as it concerns any presidential power of electronic surveillance.[33] Examining the legislative history of section 2511(3) to determine congressional intent, the Court quoted from Senator Hart's remarks made during debate on the section:

> [A]s I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague. . . . Section 2511(3) merely says that if the President has such power, then it is in no way affected by Title III.[34]

Finding the statute not "the measure of the executive authority asserted in this case," the Supreme Court proceeded to look to the Constitution to determine presidential authority.[35]

Before proceeding to an examination of the Constitution, the Court took great Care to limit its ruling.[36] It is important to note that the Court did not consider the question of whether the Presi-

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31. 18 U.S.C. §§ 2510-20 (1970) [hereinafter referred to as Title III].
32. 18 U.S.C. § 2511(3) (1970).
33. United States v. United States District Court, 407 U.S. 297, 303 (1972).
34. 114 CONG. REC. 14751 (1968) [quoted by the Supreme Court at 407 U.S. 297, 307 (1972)].
35. United States v. United States District Court, 407 U.S. 297, 308 (1972).
36. *Id.*

dent has authority to conduct warrantless electronic surveillance on the activities of foreign nations within or without the borders of the United States. In the instant case the Court said, "[t]here is no evidence of any involvement, directly or indirectly, of a foreign power."[37]

The President's oath of office confers upon him a fundamental duty "to preserve, protect and defend the Constitution."[38] This duty, the Court held, implicitly grants him power to protect the Government from those who would subvert or overthrow it unlawfully.[39] While not questioning the necessity of electronic surveillance to protect the Government, the Court did recognize that the President's authority to employ surveillance was potentially a great danger to individual freedoms protected by the Bill of Rights.[40] Thus, the Court proceeded to weigh the need against the danger, and the need came up short.[41]

The Court said that since the *Katz* rule extends fourth amendment protection to the recording of oral statements, which are protected by the first amendment freedom of speech guarantee,[42] in national security cases the two amendments converge to protect political dissent:

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'[43]

The need does not outweigh the threat of warrantless search and seizure to individual privacy. Therefore, adherence to the requirements of the warrant clause are necessary.[44]

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37. *Id.* at 309, n.8. The Supreme Court accepted the Attorney General's determination that there had been no interference by a foreign power.
38. U.S. CONST. art. II, § 1.
39. 407 U.S. 297, 310 (1972).
40. *Id.* at 312.
41. *Id.* at 316. The Supreme Court has found a Presidential authority to protect the domestic security, but weighs its exercise through warantless electronic surveillance against danger to civil liberties. This balancing method is similar to that use in creating exceptions to fourth amendment requirements.
42. U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble and to petition the Government for a redress of grievances."
43. 407 U.S. 297, 314 (1972).
44. *Id.* at 316.

It is submitted that the Supreme Court's application of the first amendment at this point may be evidence of a further expansion of the amendment's prohibitions. By its terms the amendment applies only to Congress.[45] In this manner it differs from the fourth amendment, which is general in its scope.[46] Both have been applied to the states.[47] But in *District Court*, the Supreme Court merged the first with the fourth amendment and balanced them against presidential action.[48]

Having found the President's constitutional power to protect the Government from unlawful overthrow insufficient to justify warrantless electronic surveillance, the Supreme Court proceeded to consider the Government's assertion that the circumstances of domestic surveillance call for an exception to the requirements of the warrant clause. The Government supported its argument with three contentions. First, prior judicial review would impede the President's efforts to protect the domestic security, since warrantless surveillance has been directed primarily at obtaining intelligence information on subversive groups, unlike the criminal investigation at which the warrant clause is aimed.[49] Second, courts lack the knowledge and "techniques" needed to determine probable cause in a national security case, since security investigations involve a great many difficult factors the courts are not competent to evaluate.[50] Third, requiring judicial authorization would endanger the national security as well as the lives of informers and agents, since not only judges, but clerks, stenographers, legal assistants and bailiffs are potential leaks.[51]

Despite the "pragmatic force" it found in the Government's position, the Supreme Court refused to create another exception to the fourth amendment. In answer to the first argument, the Court said the Government failed to show a need outweighing the potential danger to free speech that unsupervised intelligence gathering on subversive groups would cause.[52] In response to the second argument, the Court found no reason to believe that judges would not be sensitive to the issues involved in a national security case.[53] And in answer to the third, the Court could see no danger of se-

45. U.S. CONST. amend. I. *See* note 42 *supra.*

46. U.S. CONST. amend. IV. *See* note 3 *supra.*

47. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment); Gitlow v. New York, 268 U.S. 652 (1925) (first amendment).

48. 407 U.S. 297, 313 (1972).

49. Brief for Appellant at 15-16; Reply Brief for Appellant at 2-3, United States v. United States District Court, 407 U.S. 297 (1972) [summarized by the Supreme Court. *Id.* at 319].

50. Reply Brief for Appellant at 4, United States v. United States District Court, 407 U.S. 297 (1972) [summarized by the Supreme Court. *Id.* at 319].

51. Brief for Appellant at 24-25, United States v. United States District Court, 407 U.S. 297 (1972) [quoted by the Supreme Court. *Id.* at 319].

52. 407 U.S. 297, 320 (1972).

53. *Id.*

curity leaks which could not be prevented by proper methods of administration.[54]

Concluding its opinion the Supreme Court offered suggestions to alleviate some of the hardships its holding might impose upon the President in his efforts to protect the domestic security. The Court did not hold that the strict procedures mandated by Title III must be applied to the issuance of warrants in domestic security cases. For example section 2518(1) requires, *inter alia,* that an applicant for a search warrant give "particular descriptions" of the offense under investigation, the type of communication to be intercepted, and the identity, if known, of the person whose communications are to be intercepted.[55] Instead, the Court held that "[d]ifferent standards may be compatible with the fourth amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."[56] New requirements could provide for the problems of identification of targets, various types of information needed, and broader purposes not present in surveillance against more conventional types of crime. If especially sensitive cases might require special consideration, the Court suggested that Congress could authorize a certain court to handle the matter.[57]

To properly determine the magnitude of *District Court,* it is necessary to consider the holding from a practical, as well as a theoretical, point of view. Two major reasons make the Supreme Court's opinion a landmark in the development of American constitutional law: (1) it is one of the only direct rulings by the Court on the extent of presidential constitutional authority and (2) it asserts a right to limit that authority by balancing it against civil liberties, especially the right of privacy and freedom of speech.[58] But in practice, *District Court* may have a very limited effect in achieving the Court's goal of protecting dissent. The Court made no attempt to distinguish domestic security cases from cases where a foreign power is involved,[59] leaving the Attorney General with a substantial area of discretion and thus room for abuse. Furthermore, the deterrents to illegal searches and seizures, the exclusionary rule and civil and criminal sanctions, have not proven effective.[60]

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54. *Id.* at 320-21.
55. 18 U.S.C. § 2518 (1970).
56. 407 U.S. 297, 322-23 (1972).
57. *Id.* at 323.
58. *Id.* at 313.
59. *Id.* at 309 n.8.
60. *See* note 70 *infra.*

The Supreme Court's only previous direct limitation of presidential constitutional authority occurred in *Youngstown Sheet and Tube Co. v. Sawyer*,[61] where the Court held invalid a presidential directive ordering the seizure of most of the nation's steel mills. President Truman asserted he had acted within the "aggregate" of his constitutional powers as chief executive and commander-in-chief of the armed forces. The Court found this action an intrusion into the law-making powers entrusted to the Congress.[62]

District Court, however, is much broader in its scope. Whereas *Youngstown Sheet* involved a very limited presidential action in an emergency, an unprecedented assertion of constitutional authority, *District Court* ruled on a long and often used power.[63] Furthermore, in *District Court* there was an explicit weighing of presidential power against civil liberties that was not present in *Youngstown Sheet*.[64]

Although the *Youngstown Sheet* decision ended the President's seizure of the steel industry, the prospects for the Supreme Court obtaining similar effectiveness from the *District Court* decision are not good. The lack of a definition of "domestic security" leaves the Attorney General without guidelines to determine where his authority begins and ends, and the remedies designed to discourage warrantless searches and seizures are inadequate. The Supreme Court makes no attempt to define "domestic organizations" as it was used in the Attorney General's affidavit. Rather, it accepts that statement by the Attorney General prima facie as a determination that domestic security only was involved.[65] The Court anticipates difficulty in distinguishing domestic security from national security where a foreign power is involved and implies that definitions will arise on a case-by-case basis.[66] As it stands now, an attorney general may take advantage of the vagueness and thus contravene the purposes of the Court.[67]

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61. 342 U.S. 579 (1952).

62. *Id.* at 587.

63. Statistics provided by the Justice Department for 1969 and 1970 show that more executive-ordered than court-ordered wiretaps and "bugs" were used in those years, and that the executive-ordered surveillance was carried on for much longer periods, 407 U.S. 297, 334 (1972) (concurring opinion of Douglas, J.).

64. Whereas *Youngstown Sheet* was a case of the President superceding his power and intruding into the legislative domain, District Court balanced the need for the President to exercise his power in a certain manner, i.e., electronic surveillance, and the possible danger of that exercise to Bill of Rights liberties.

65. 407 U.S. 297, 309 at n.8 (1972).

66. *Id.*

67. The purposes of the Court are the protection of the right to privacy and freedom of political dissent. *Id.* at 314.

An attorney general, under the District Court ruling, could build a case for any warrantless surveillance on a mere pretense of foreign involvement. Although evidence so obtained might be suppressed if it were presented at trial, the target of the surveillance would have been intimidated

The Supreme Court's major deterrent to warrantless searches is the exclusionary rule.[68] Recently, it held that a civil action lies against the perpetrators of illegal searches.[69] The effectiveness of both has been widely questioned.[70] The fourth amendment cause of action allowed by the Supreme Court in *Bivens* has been augmented by statutory remedies with both civil[71] and penal[72] sanctions. Yet no method has avoided the reluctance of American juries to convict for illegal searches or to find significant damages against policemen.[73]

It is submitted that from a practical viewpoint, the *District Court* decision will have little value in accomplishing the Court's goal of protecting privacy and free speech. Yet whether or not the decision will deter warrantless electronic surveillance, it does extend the protection of the exclusionary rule to a defendant like Plamondon in this case, and will permit victims of unauthorized searches to attempt to recover damages through civil actions. And as meager as the deterrent effect of *District Court* might be, it does avoid the potentially disastrous threat to civil liberties that a finding that the President could conduct warrantless electronic surveillance would have created.

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and have had his privacy unlawfully invaded, thus defeating the Court's purpose.

68. *See* note 9 *supra.*

69. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

The Supreme Court found that petitioner, who claimed the agents arrested him and searched his apartment with neither arrest nor search warrants, had stated a cause of action under the fourth amendment. *Id.* at 389.

70. While a judge of the United States Court of Appeals for the District of Columbia, Mr. Chief Justice Burger wrote:

> I suggest that the notion that suppression of evidence in a given case effectively deters the future action of the particular policeman or of policemen generally was never more than wishful thinking on the part of the courts.

Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 12 (1964).

See, e.g., Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952-54 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 672-78 (1970); Schaefer, *The Fourteenth Amendment and Sanctity of the Person*, 64 NW. U. L. REV. 1, 14 (1969); Comment, *The Statutory and Constitutional Protections From Illegal Wiretapping Available to an Immune Witness Before a Federal Grand Jury*, 76 DICK. L. REV. 86, 118-19 (1971).

71. 18 U.S.C. § 2520 (1970).

72. 18 U.S.C § 2511(1) (1970).

73. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 673 (1970).

CONSTITUTIONAL LAW—NO IMPRISONMENT FOR ANY DEFENDANT WHO HAS NOT HAD OR WAIVED THE ASSISTANCE OF COUNSEL AT HIS TRIAL, REGARDLESS OF THE CLASSIFICATION OF THE CRIMINAL OFFENSE CHARGED

Argersinger v. Hamlin, 407 U.S. 25 (1972)

In *Argersinger v. Hamlin*,[1] the United States Supreme Court was confronted with the question whether the sixth amendment[2] right of an indigent criminal defendant to counsel extends to trials for misdemeanor and petty[3] offenses. The Court had refused to hear this precise issue three times[4] since its landmark decision in *Gideon v. Wainwright*,[5] where the sixth amendment guarantee was made applicable to the states in felony cases through the fourteenth amendment due process clause.[6] However, in *Argersinger*, it was held that no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he is represented by counsel at trial or has specfically waived his right.[7]

Argersinger, an indigent, was charged with carrying a concealed weapon, an offense punishable by a prison term of up to

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1. 407 U.S. 25 (1972).
2. U.S. CONST. amend. VI provides:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.
3. There is much variation in the definition of these offenses among the jurisdictions. In 18 U.S.C. § 1 (1964) they are classified in the following manner:
   Notwithstanding any Act of Congress to the contrary:
   (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
   (2) Any other offense is a misdemeanor.
   (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.
4. DeJoseph v. Connecticut, *cert. denied*, 385 U.S. 982 (1966); Cortinez v. Flournoy, *cert. denied*, 385 U.S. 925 (1966); Winters v. Beck, *cert. denied*, 385 U.S. 907 (1966).
5. 372 U.S. 335 (1963).
6. U.S. CONST. amend. XIV, § 1 provides in part:
   . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .
7. Argersinger v. Hamlin, 407 U.S. 25 (1972).

six months and a fine of one thousand dollars.[8] At trial, where he was not represented by counsel and had not waived his right to counsel, Argersinger was found guilty and sentenced to serve ninety days. In a subsequent original habeas corpus action in the Florida Supreme Court, he contended that he was denied his right to counsel and was not able to properly present his defense. The Florida court discharged the writ[9] on the basis that the United States Supreme Court had yet to rule definitively on this issue,[10] and that the right to counsel extended only to trials for non-petty offenses punishable by more than six months imprisonment.[11]

Before analyzing the *Argersinger* opinion, it is important to review the recent history of right to counsel cases. In the past decade, there has been a great expansion in the individual's right to counsel in criminal proceedings against him. At present, this right extends to practically all stages of the criminal process: during interrogation,[12] during a lineup,[13] during a preliminary hearing,[14] for an appeal,[15] and, during a probation revocation hearing.[16] However, prior to *Argersinger*, the right to counsel had been articulated only for felons[17] and for juvenile offenders.[18]

The case law relating the right to counsel to the seriousness of the offense originated with *Powell v. Alabama*.[19] In *Powell* it was held that, in capital cases, the state courts are required by the fourteenth amendment due process clause to appoint counsel for any defendant who is unable to employ his own counsel and who is incapable of presenting his own defense. The Court further stated that the right to counsel could not be denied "without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions'."[20] In spite of this strong language, the court did not extend its holding beyond capital cases.

In *Johnson v. Zerbst*,[21] the initial case to rule on the federal

8. FLA. STAT. ANN. §§ 790.01(1), 795.082(3)(a), 775.083(3) (Supp. 1972).
9. State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970).
10. *See* note 4 *supra*.
11. State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442, 443 (Fla. 1970).
12. Miranda v. United States, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
13. United States v. Wade, 388 U.S. 218 (1967).
14. Coleman v. Alabama, 399 U.S. 1 (1970).
15. Douglas v. California, 372 U.S. 353 (1963).
16. Mempa v. Rhay, 389 U.S. 128 (1967).
17. Gideon v. Wainwright, 372 U.S. 335 (1963).
18. *In re* Gault, 387 U.S. 1 (1967).
19. 287 U.S. 45 (1932).
20. *Id.* at 67.
21. 304 U.S. 458 (1938).

law in this area, the sixth amendment prescription of the right to the assistance of counsel in all criminal prosecutions was taken literally. Under the *Johnson* rule, all federal courts in criminal proceedings are prohibited from depriving an accused of his life or his liberty unless he has had or has waived the aid of counsel.[22] The Court's rationale is reminiscent of *Powell*.[23] It points out that what is easily understood by the lawyer "may appear intricate, complex, and mysterious"[24] to the legally unsophisticated defendant. Thus, the assistance of counsel was required for federal prosecutions unless waived.

Only four years later in *Betts v. Brady*,[25] the Court refused to use the fourteenth amendment to impose the *Johnson* obligation to appoint counsel on the state courts. Instead, the state courts were given the discretionary power to appoint counsel whenever, in the interests of fairness, it seemed to be required by the circumstances of the case.[26] No unequivocal duty to appoint counsel was placed on the state courts because the Court did not find a positive command in the language of the fourteenth amendment to make the appointment of counsel obligatory in all cases.[27] This disparity between the respective obligations of the federal and the state courts seemed to rest on the Court's hesitation to fully apply the sixth amendment standards for all criminal prosecutions[28] to the states.

However, in *Gideon v. Wainright*,[29] the Court's recalcitrance on this point was partially overcome. In *Gideon*, a felony case, the Court recognized the right to counsel as fundamental and specifically overruled *Betts*. The Court held that an indigent defendant in a state criminal prosecution has the right to court-appointed counsel.[30] And yet, nowhere in the case is the right to court-appointed counsel expressly limited to felony cases; but whether it does extend beyond felony cases is not clear from the language of the majority opinion. Moreover, until *Argersinger*, there was to be no consideration[31] in the United States Supreme Court of the question.[32]

Nonetheless, active consideration of the question whether the right to counsel extends to misdemeanor offenses was not lacking in the various state and federal courts during this period. The

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22. *Id.* at 463.
23. *See* text accompanying note 20 *supra*.
24. 304 U.S. 458, 462-63 (1938).
25. 316 U.S. 455 (1942).
26. *Id.* at 471-72.
27. *Id.* at 473.
28. *See* note 2 *supra*.
29. 372 U.S. 335 (1963).
30. *Id.* at 344-45.
31. *See* cases cited note 4 *supra*.
32. Only once did the Court even consider a closely related problem; *see In re* Gault, 387 U.S. 1 (1967).

states, without definite guidance from the Court, developed a wide range of statutory and court-made rules on the subject.[33] Nine states provided counsel for most misdemeanors.[34] Twenty-two states provided counsel for certain misdemeanors.[35] The remaining nineteen states did not require the appointment of counsel in any misdemeanor cases.[36] In spite of the *Johnson* rule, the situation in the federal courts was only slighly better. As early as 1942, one lower federal court held that, respecting the accused's right to counsel, there is no valid distinction between felonies and misdemeanors.[37] Subsequent to the passage of the Criminal Justice Act of 1964,[38] a number of other federal courts have required representation of counsel for those accused of misdemeanors.[39] But, there remained many federal courts which had not considered the question and others which refused to make a blanket application of the right to counsel in all misdemeanors.[40]

The Florida Supreme Court's dilemma in handling Argersinger's writ of habeas corpus[41] is illustrative of the enigma with which the courts were confronted. The court had a number of alternatives open to it with no completely binding mandate to follow. The Florida decisions had made it clear that defendants were not entitled to court-appointed counsel when charged with a misdemeanor.[42] The federal courts of Florida's judicial circuit were alternately affirming and rejecting the applicability of

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33. For a state by state analysis see Allison and Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 94-105 (1971).

34. *Id.*

35. *Id.*

36. *Id.*

37. Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

38. 18 U.S.C. § 3006A(b) (1964), as amended, 18 U.S.C. § 3006A(b) (Supp. 1972).

> In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. . . .

See also FED. R. CRIM. P. 44.

39. *See, e.g.*, Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971); Beck v. Winters, 407 F.2d 125 (8th Cir. 1969); Wilson v. Blabon, 370 F.2d 997 (9th Cir. 1967); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966).

40. *See, e.g.*, Brinson v. State, 273 F. Supp. 840 (S.D. Fla. 1967).

41. *See* note 9 and accompanying text *supra*.

42. Watkins v. Morris, 179 So. 2d 348 (Fla. 1965); Fish v. State, 159 So. 2d 866 (Fla. 1964).

Gideon to all state trials of misdemeanors.[43] Moreover, the United States Supreme Court had refused to hear the question.[44] Thus, the Florida court could include or exclude misdemeanors completely. It could include serious misdemeanors and exclude petty ones.[45] Or, it could disregard the felony-misdemeanor definitional dichotomy and use the seriousness of the offense as its dividing line for applying the sixth amendment right to counsel.

The Florida Supreme Court chose the serious offense standard set out in *Brinson v. State*[46] which required court-appointed counsel only for trials of non-petty offenses punishable by more than six months imprisonment. The court said:

> [W]e feel we have no alternative but to adopt the decision of the federal court of this judicial circuit that we feel most nearly approximates any decision in this respect that might be adopted by the Supreme Court of the United States.[47]

Mr. Justice Boyd, in his dissenting opinion, foresaw the end of the use of artificial distinctions to determine whether the sixth amendment was applicable; he said that "any indigent charged with violating any . . . law . . . punishable by a jail sentence . . . for any time whatever is entitled to counsel at the expense of the . . . government."[48] However, only a ruling by the United States Supreme Court could conclusively settle this matter of the extent of the right to counsel.

In *Argersinger*, the issue before the Court was whether the fourteenth amendment required the states to apply the sixth amendment right to counsel in misdemeanor cases. The Court, speaking through Mr. Justice Douglas, noted that the sixth amendment provides specified standards for all criminal prosecutions and that many of these standards previously had been made applicable to the states through the fourteenth amendment.[49] The Florida Supreme Court's ruling on Argersinger's writ of habeas corpus as regards the right to counsel was analogous to the standard set out by the Court in *Duncan v. Louisiana*[50] for the sixth amendment right to trial by jury. In *Duncan*, the right to trial by jury was restricted to non-petty offenses punishable by more than six months imprisonment.[51] However, in *Argersinger*, the Court rejected the attempted analogy between this limitation on the

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43. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); Brinson v. State, 273 F. Supp. 840 (S.D. Fla. 1967).
44. *See* cases cited note 4 *supra.*
45. *See* note 38 *supra.*
46. 273 F. Supp. 840 (S.D. Fla. 1967).
47. State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442, 443 (Fla. 1970).
48. *Id.* at 446.
49. 407 U.S. 25 (1972).
50. 391 U.S. 145 (1968).
51. *Id.*

right to trial by jury and the right to counsel as simply unsupportable. Whereas both of these rights are guaranteed by the sixth amendment, the right to trial by jury has a much different genealogy.[52] Where the Court found historical support for limiting the right to trial by jury, it discovered no concomitant justification for the same limitation on the right to counsel.[53] The right to trial by jury developed as a protection against the arbitrary use of unchecked power by a judge against a defendant.[54] Historically, the deep commitment to this protection has been limited to serious criminal cases.[55] Antithetically, the common law provided for appointment of counsel in misdemeanor and civil cases.[56] And the Court said that the sixth amendment has carried the right to counsel beyond these common law dimensions to all levels of criminal prosecutions.[57]

In refusing to use the right to jury trial standard to circumscribe the right to counsel, the Court deemed the right to counsel a more fundamental constitutional right. Reviewing the language of *Powell* and *Gideon*, the Court reiterated its position that the "assistance of counsel is often a requisite to the very existence of a fair trial."[58] On that basis the Court finally took the decisive step it had so long refused to take in this area. In answer to the contention that the *Powell* and *Gideon* rulings involved felonies and therefore did not extend to misdemeanors, the Court stated that their common rationale with respect to the fundamental nature of the right to counsel was applicable to all criminal prosecutions where the accused may be deprived of his liberty. The Court noted that there was little reason to believe that petty offence prosecutions necessarily involve less complex legal questions than trials for more serious offenses. Such cases "often bristle with thorny constitutional questions."[59] Thus the Court ruled that even with minor offenses where a defendant's liberty is at stake, the aid of counsel in coping with complex legal problems, in scrutinizing the regularity of the proceedings and in presenting a defense is indispensable.[60]

The Court also considered the general atmosphere in which misdemeanor trials are conducted and took notice of the tremed-

52. 407 U.S. 25, 29 (1972).
53. *Id.* at 29, 30.
54. *Id.* at 29.
55. *Id.* at 30.
56. *Id.*
57. *Id.*
58. *Id.* at 31.
59. *Id.* at 33.
60. *Id.* at 34.

ous volume of cases,[61] the hurried nature of the proceedings, the frequency of guilty pleas and the obvious prejudice to the defendant.[62] These circumstances were viewed as further proof that the assistance of counsel for the misdemeanant is imperative. In this context, the Court made brief mention of the trial judge's added duty of determining when counsel is required.[63] This duty will be complicated by the fact that for some crimes which are punishable by a jail term, incarceration is hardly ever imposed. This places the judge in an awkward position when he attempts to apply the no imprisonment without counsel standard of *Argersinger*. The Court, however, gave no indication that it considered the trial judge's dilemma difficult of resolution.

In addition, the Court stated that it did not share the fears of some that the volume of misdemeanor cases would make implementation of the holding impossible.[64] In fact, Mr. Justice Douglas found it difficult to understand how it could be argued that our legal resources would be insufficient to meet the new demands engendered by the ruling. In separate concurring opinions, Mr. Chief Justice Burger and Mr. Justice Brennan also expressed confidence that the judicial system would rise to meet the practical problems.[65]

However, Mr. Justice Powell, in concurring, expressed reservations whether the decision could actually be implemented.[66] He criticized the majority rule as too easily amenable to further broad extension. Pointing to the majority's silence on the right to counsel where deprivation of liberty is not a question, he stated that there is no constitutional basis for distinguishing between loss of liberty and loss of property under the due process clause.[67] Therefore, the rights guaranteed through the fourteenth amendment would seem to be guaranteed in both loss of liberty and loss of property cases. With this potential for even further expansion of the right to counsel, Mr. Justice Powell wondered if the burdens upon the criminal justice system will prove too much.

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61. *See* I. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS, 123-25 (1965). It is estimated that there are five million persons charged with misdemeanors annually. Of this number, between 25 per cent and 50 per cent are indigent. *Id.* at 125.

62. 407 U.S. 25, 31 (1972).

63. *Id.* at 40.

64. *Id.* at 39.

65. Justice Brennan suggested that law students could be used to help fill the need for more attorneys. Chief Justice Burger commented on the added duties trial judges and prosecutors will assume as a result of the holding.

66. For a vigorous, well-documented argument that implementation will not be too great a strain see Allison and Phelps, *supra* note 47, at 83-92. *See also, Report to the Conference on Legal Manpower Needs,* 41 F.R.D. 389; Note, *Dollars and Sense of an Expanded Right to Counsel,* 55 IOWA L. REV. 1249, 1259-67 (1970).

67. 407 U.S. 25, 31 (1972).

He also found the majority rule as inflexible as the one adopted by the Florida Supreme Court and suggested a middle road whereupon the trial judge would determine when the assistance of counsel would be necessary to insure a fair trial. But, this is the type of standard which the Court previously propounded in *Betts* and then specifically overruled in *Gideon*. It is submitted that such a standard would return this area of law to the state of confusion which existed prior to *Argersinger*. Moreover, in spite of all his objections, Mr. Justice Powell does not quarrel with the result reached. His objections were aimed not at the underlying basis for the majority's decision but at the problems of applying that decision. The sixth amendment guarantees the right to counsel for all criminal prosecutions[68] and such potential practical difficulties in no way negate or undermine the sound constitutional basis relied on by the majority to extend the right to counsel to misdemeanors.[69]

In conclusion, the *Argersinger* ruling authoritatively states the law in an area where confusion has recently been the rule. The Court can be criticized only for its delay in resolving the matter.[70] Despite the potential implementation problems, *Argersinger* provides a working standard by which the right to counsel can confidently be applied. Moreover, the language of the decision provides the basis for extending the right to counsel to other areas. One area is where the defendant in a criminal proceeding is faced with a possible loss of property. As Mr. Justice Powell suggested,[71] the due process clause readily admits of such an interpretation. Furthermore, loss of property is only one of many legal penalties which may have more serious consequences for a defendant than a brief jail term for a criminal offense. A mother may lose her child in a child neglect proceeding. A civil commitment hearing may result in an involuntary deprivation of liberty for a considerable

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68. *See* note 2 *supra*.

69. Does the right to counsel necessarily stop short of the supporting investigative services which help make counsel effective? *See Report to the Conference . . ., supra* note 65, at 403; Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 717 (1968); Note, *Right to Aid in Addition to Counsel for Indigent Defendants*, 47 MINN. L. REV. 1054 (1963).

70. The writers and commentators have anticipated and awaited such a decision. *See generally* Junker, *supra* note 69; Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1 (1963); Comment, *The Right to Counsel for Misdemeanants in State Courts*, 20 ARK. L. REV. 156 (1966); Note, *Right to Counsel for Misdemeanants: A Post-Gideon View*, 22 SW. L.J. 679 (1968); 23 U. FLA. L. REV. 428 (1971).

71. *See* text accompanying note 67 *supra*.

length of time. The inability to bring or defend a civil action may also be a severe imposition on an individual.[72] In *Argersinger*, the right to counsel was recognized as a fundamental right whenever the defendant's liberty is at stake, no matter how short the time. It is logically only a short step to extend the right to counsel to a defendant who is confronted with a comparatively more severe loss.

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72. *See* generally Comment, *Right to Counsel in Civil Litgation*, 66 COL. L. REV. 1322 (1966); Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

LANDLORD-TENANT: CONTRACTUAL BASIS FOR AN IMPLIED WARRANTY OF HABITABILITY IN LEASED PREMISES

Hinson v. Delis, 26 Cal.App.3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972)

In *Hinson v. Delis*[1] the California Court of Appeals, First District, ruling on an issue of first impression in that state,[2] held that an implied warranty of habitability exists in a lease agreement between landlord and tenant. The court further concluded that the lessee is obligated to make rental payments only after the landlord has fulfilled his duty to substantially comply with the city's housing code and make the premises habitable, and that such payment is to be the reasonable rental value of the premises for such time as the premises were in violation of the housing code. Thus *Hinson* has become another of a small number of cases[3] which in the last twelve years have rejected the doctrine of caveat emptor in landlord-tenant relationships[4] by finding an implied warranty of habitability in the lease agreement.

In *Hinson*, the plaintiff leased an apartment pursuant to a written month-to-month rental agreement with the defendant-landlord. When the tenant took possession of the apartment, it was apparently in habitable condition, but within a year several defects developed, including a hole caused by dry rot in the bathroom floor[5] and a leaky toilet which caused foul odors. The plaintiff

1. 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972).
2. *Id.* at 68, 102 Cal. Rptr. at 665.
3. Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. Cir. 1970); Lund v. MacArthur, 51 Haw. 473, 462 P.2d 482 (1969); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Reste Realty Corporation v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
4. *See, e.g.*, Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); Skillen, *Implied Warranties in Leases: The Need for Change*, 44 DENV. L.J. 387 (1967); Note, *Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform*, 2 RUTGERS CAMDEN L.J. 120 (1970); Comment, *Plotting the Long-Overdue Death of Caveat Emptor in Leased Housing*, 6 U.S.F. L. REV. 147 (1971).
5. In *Hinson*, the plaintiff allegedly fell and injured herself as a result of the hole, but this tort issue was not litigated. Generally, in the absence of an agreement to the contrary, a landlord is not liable to the tenant in tort for injuries resulting from defects developing during the

gave timely notice to the landlord of these defects, but the necessary repairs were not made. Since the plaintiff was indigent and disabled, she could not afford to make the repairs herself. In addition, she could not find another apartment due to the shortage of housing for low-income people. Therefore, the tenant contacted a city official who inspected the apartment and found that the alleged defects constituted violations of the local municipal housing code. He reported these findings to the defendant who shortly thereafter remedied the defects. However, the plaintiff had refused to pay her rent for a two and one-half month period during which the defects existed and had received a notice from the landlord requiring her to pay the rent due or leave the premises. The plaintiff petitioned the lower court for a declaratory judgment that she was obliged to pay the full rent only after the landlord complied with his duty to substantially obey the housing code.[6] The court found that despite the defects which existed during the tenancy, the plaintiff had no right to withhold the rent from the lessor.[7]

The appeals court prefaced its discussion of the implied warranty of habitability in leased premises with a review of alternative forms of relief available to tenants whose landlords fail to conform the leased premises to the required standard of "habitability." The first remedy discussed is based upon illegal contract theory, *i.e.*, the lease agreement is an illegal contract which is void and unenforceable. The rationale for this theory is based on public policy which requires that certain types of transactions be discouraged.[8] Courts that have applied the illegal contract rationale require that the defects exist prior to the execution of the lease or that both parties knowingly and willingly acquiesce in the illegality.[9] In the

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lease. W. Prosser, THE LAW OF TORTS § 63 (4th ed. 1971). *But see* Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960), where the court found that a landlord may be liable to a tenant in tort when he violates the housing code which requires the landlord to keep facilities in a safe condition.

6. Hinson v. Delis, 26 Cal. App. 3d 62, 65, 102 Cal. Rptr. 661, 664-65 (Ct. App. 1972). In addition the plaintiff sought an order enjoining the landlord from filing any eviction action based on non-payment of rent during the pendency of the action. This issue was later considered moot and was dismissed by the court of appeals since the landlord and tenant had filed a stipulation wherein they agreed that, during the pendency of the action, the landlord would not attempt to evict the tenant for non-payment of the rent and the tenant would resume regular payments.

7. *Id.* at 66, 102 Cal. Rptr. at 663.

8. Shephard v. Lerner, 182 Cal. App. 2d 746, 750, 6 Cal. Rptr. 433, 435 (Ct. App. 1960).

9. *Id.* at 746, 6 Cal. Rptr. at 433, where the parties knew that numerous violations of the housing code existed, yet entered into a lease agreement, and the court held that since the contract was for an illegal purpose, no enforceable rights and duties could arise and the landlord could not collect the rent. *See also* Brown v. Southall Realty Company, 237 A.2d 834 (D.C. App. 1968), where the lease agreement was found to be an illegal

instant case, however, the faulty conditions did not manifest themselves until months after the lessee moved into the apartment, nor did the lessee acquiesce in the defective conditions. In addition, since the illegal contract remedy terminates a lease, the court realized that it would not respond to the needs of the plaintiff in the instant case who desired to remain in the apartment after the defects were repaired.

The court additionally reviewed and rejected the remedy of constructive eviction which requires that the tenant abandon the premises within a reasonable time after giving notice that the premises are uninhabitable or unfit for his purposes.[10] This type of relief puts the tenant in a dangerous position because abandonment is always at a risk of establishing sufficient facts to constitute constructive eviction,[11] and the tenant will be liable for breach of the rental agreement for failure to do so. Also, of course, the tenant must "gamble" on the time factor, since he must abandon within a "reasonable" time or be deemed to have waived the defects.[12] In the instant case, the "gamble" was not worth taking. On the other hand, many courts have sought to relieve the effects of pure constructive eviction by allowing for a constructive eviction in equity without requiring abandonment[13] or by finding partial constructive eviction where alternative housing was scarce, thus allowing the tenant to remain on at least part of the premises.[14] Neither of the above revisions of constructive eviction were accepted by the court which recognized the necessity of permitting the tenant under these circumstances to remain in the apartment while affording an equitable remedy. In generally dismissing the remedy of constructive eviction, the court stated that "to continue the use of such judicial fictions, however, is unnecessary when preferable alternatives exist."[15]

The "preferable alternative" that the *Hinson* court chose was the still "revolutionary" theory of implied warranty of habitabil-

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contract since conditions constituting a violation of the housing code existed prior to an agreement to lease.

10. Lemle v. Breeden, 51 Haw. 426, 434-35, 462 P.2d 470, 475 (1969).

11. For a discussion of acts of the landlord that generally do constitute a constructive eviction, see 52 C.J.S. *Landlord and Tenant* § 458 (1968, Supp. 1971).

12. Hinson v. Delis, 26 Cal. App. 3d 62, 69, 102 Cal. Rptr. 661, 666 (Ct. App. 1972).

13. *See* Charles E. Burt, Inc. v. Seven Grand Corporation, 340 Mass. 124, 163 N.E.2d 4 (1959).

14. *See* Major Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (Mun. Ct. 1946).

15. Hinson v. Delis, 26 Cal. App. 3d 62, 69-70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972).

ity.[16] Although caveat emptor remains the law in landlord-tenant relations in the majority of jurisdictions,[17] it has recently been subject to increasing criticisms.[18] The few courts which have favored implied warranties of habitability in leases over caveat emptor have noted the changing character of the lease in modern society. The value of a lease to tenants today is not in the land itself, but rather, in the right to enjoy the use of the building on that land, which necessarily must be habitable.[19] Even the many courts which have retained caveat emptor in favor of an implied warranty of habitability have allowed exceptions to the caveat emptor rule. These courts have recognized an implied warranty of habitability in leases in three different and limited circumstances: (1) where the defects are not readily discoverable by a reasonable inspection and those defects are known to the landlord,[20] (2) where furnished premises are let for a short term under circumstances indicating that the parties intended immediate occupancy,[21] and (3) where a lease restricting the lessee to a particular use is accepted before the premises are completely constructed or altered.[22] Also, the courts have periodically side-stepped the caveat emptor doctrine by recognizing such tenant remedies as illegal contract[23] and constructive eviction.[24] But neither the minor exceptions nor the latter remedies can help such tenants as the plaintiff in *Hinson.*

The *Hinson* court followed the lead of a small number of jurisdictions which have found an implied warranty of habitability in a lease agreement.[25] Invoking the rationale of the landmark Wisconsin case, *Pines v. Perssion,*[26] the appeals court quoted extensively from that opinion:

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16. Historically, the lease developed in agrarian England and was subject to English property law which said that the lessee of real estate leased the premises under the doctrine of caveat emptor. Based on the assumption that a prospective lessee had an opportunity to inspect the premises before leasing them, the law developed that there was nothing implied in the lease that guaranteed that the premises would be habitable or fit for the purpose for which they were acquired, and if they became uninhabitable or unfit, the lessee could not interpose uninhabitability as a defense. *See* Note, *Implied Warranty of Habitability in Housing Leases,* 21 DRAKE L. REV. 300 (1972), for a concise history of the implied warranty of habitability in leases. *See also* Lesar, *Landlord and Tenant Reform,* 35 N.Y.U. L. REV. 1279 (1960), where the author notes that "paradoxically," the lease originated in English law as primarily a personal contract.

17. *See* 59 AM. JUR. 2d *Landlord and Tenant* § 769 (1970, Supp. 1972); *e.g.,* McAuvic v. Silas, 190 Pa. Super. 24, 28, 151 A.2d 662, 664 (1959).

18. *See* note 5 *supra. See also* Bearman, *Caveat Emptor in Sale of Realty—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541 (1961).

19. Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 251 (1971).

20. McAuvic v. Silas, 190 Pa. Super. 24, 151 A.2d 662 (1959).

21. Horton v. Marston, 352 Mass. 322, 225 N.E.2d 311 (1967).

22. Young Corporation v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd,* 66 S.W.2d 676 (Tex. 1933).

23. *See* note 9 and accompanying text *supra.*

24. *See* note 10 and accompanying text *supra.*

25. *See* note 3 *supra.*

26. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

> Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases, would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor.[27]

In *Pines* the tenants were students holding a one-year lease, and the landlord had represented the furnished house as habitable. However, it was found that the house contained many building code violations making it untenantable. The Wisconsin Supreme Court held that there was an implied warranty of habitability in the lease and that the tenants could move out and be liable for only the reasonable rental value.[28] Yet it is uncertain whether the implied warranty was based on the traditional "limited opportunity to inspect" and "furnished housing" exceptions[29] or whether it was an implied warranty to be found in all leases of that type. Furthermore, it is difficult to determine whether the implied warranty was based on legislative and social policy or whether its foundation was in contract law.

In order for the *Hinson* court to make effective use of the implied warranty of habitability theory, it first had to find a basis for that theory which would give the tenant a suitable and equitable remedy. The court found the requisite support in contract law as it is formulated in *Lemle v. Breeden*,[30] the first purely implied warranty of habitability case. In *Lemle* the Supreme Court of Hawaii stated that:

> [A] lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied

27. *Id.* at 595-96, 111 N.W.2d at 412-13.
28. *Id.* at 597, 111 N.W.2d at 413.
29. *Id.* at 595, 111 N.W.2d at 412.
30. 51 Haw. 426, 462 P.2d 470 (1969). The dwelling in issue was a large, furnished sea-side house which the tenants leased for several months after making, a brief inspection of the premises. When it was discovered that an infestation of rats made the premises uninhabitable, the Supreme Court of Hawaii allowed the plaintiff-tenants to recover under an implied warranty of habitability in the lease agreement.

warranty of habitability and fitness for the purposes intended is a just and necessary implication.[31]

For several years courts had analogized the sale of houses to the sale of goods where an implied warranty had been found,[32] and for years several critics, and even some courts, had noted that a lease was a contractual agreement and should be treated as such.[33] But *Lemle* was the first instance where a court emphatically held that a lease is a contractual relationship, and therefore, contains an implied warranty of habitability.[34]

In 1970 two courts followed the lead of *Lemle*. *Marini v. Ireland*[35] found an implied warranty of habitability against latent defects, and "ancillarily," an implied covenant to repair vital facilities,[36] reasoning that a lease is a contract based on mutually dependent and independent covenants arising out of the intentions of the parties.[37] *Marini* stated that one obvious intention of the parties is to give and receive habitable premises,[38] *i.e.*, an implied warranty of habitability. The second decision, *Javins v. First National Realty Corporation*,[39] is closely analogous to the facts of *Hinson*.

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31. *Id.* at 433, 462 P.2d at 474. *See also* Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971). The condition of a tenant's apartment was in violation of the city housing code and the tenant brought an action against the landlord to recover the difference between the rental price and the reasonable rental value of the apartment. The New Hampshire Supreme Court found an implied warranty of habitability in the lease agreement and decided that the tenant had available to him the contract remedies of rescission, reformation, and damages. *Id.* at 94, 276 A.2d at 252.

32. *See* Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). *See also* Carpenter v. Donohoe, 154 Colo. 78, 338 P.2d 399 (1964); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968). In a recent case, the court went even further and said that "the implied warranties of fitness and merchantability extend to the purchasers of new condominiums in Florida from builders." Gable v. Silver, 258 So. 2d 11, 18 (Fla. 1972).

33. See Medico-Dental Building Co. v. Horton & Converse, 21 Cal. 2d 411, 418, 132 P.2d 457, 462 (1942). *See also* 1 AMERICAN LAW OF PROPERTY § 3.11 at 202-5 (A.J. Casner ed. 1952); Friedman, *The Nature of a Lease in New York*, 33 CORNELL L.Q. 165 (1947).

34. Lemle v. Breeden, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969). *See also* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969), which was decided several months earlier than *Lemle*, and enthusiastically advocated finding an implied warranty of habitability in leases but ostensibly decided the case on constructive eviction grounds.

35. 56 N.J. 130, 265 A.2d 526 (1970). A landlord ignored his tenant's request to repair a leaky toilet and the tenant herself had it repaired. The court allowed the tenant to off-set the cost of repair against the rent.

36. *Id.* at 144, 265 A.2d at 534.

37. *Id.* at 145, 265 A.2d at 534-35. *Marini* does not base its remedies in contract law. The court stated that "the tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive notice." *Id.* at 147, 265 A.2d at 535. *See* Note, *Landlord and Tenant—New Remedies for Old Problems*, 76 DICK. L. REV. 580 (1972), for a detailed discussion of *Marini* and comparisons with *Javins*.

38. *Id.* at 144, 265 A.2d at 534.

39. 428 F.2d 1071 (D.C. Cir. 1970). *See also* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). The Illinois court agreed with *Javins*

Javins involved an indigent tenant whose urban apartment was plagued by building code violations which had arisen after the lease had commenced, and the tenant did not wish to leave. In finding an implied warranty of habitability in the lease agreement, Judge Wright speaking for the *Javins* court said that its holding "reflected a belief that leases of urban dwelling units should be interpreted and construed like any other contract."[40] *Javins* indicates that there are still reasons for continuing to apply strict property law where the tenant receives an interest in the land,[41] but in the urban environment, an apartment is essentially a "package of goods and services" which should be governed by contract law.[42] Although *Hinson* does not explicitly or implicitly exclude the applicability of contract law to the lease of a single house with an interest in the land, it agrees with *Javins* in that an implied warranty of habitability based on contract principles should be found in leases of urban apartments in multi-unit buildings.

A contractual basis was not the only source available to the *Hinson* court wherein it could find an implied warranty of habitability. If the court of appeals desired to find a basis for the implied warranty, it could simply have looked to the California Civil Code which requires a warranty of fitness in every lease.[43] Under the California statute, however, the tenant's only remedy would have been to do the repair work herself, deducting the costs from the rent, or to vacate the premises without being liable for the rent (essentially constructive eviction).[44] In the instant case the

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and held, *inter alia,* that included in lease contracts, both oral and written, for multiple unit dwellings is an implied warranty of habitability which is fulfilled by substantial compliance with the provisions of the municipal building code. But a lengthy dissent noted that "the legislature is in a better position than this court to consider the problems involved and to determine any needed changes in the well settled common law and statutory doctrines." *Id.* at 370, 280 N.E.2d at 220.

40. Javins v. First National Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970).

41. *Id.* at 1074.

42. *Id.* at 1074-75.

43. CAL. CIV. CODE § 1941 (West 1954) requires that:

> The lessor of a building intended for the occupation of human beings must, in the absence of agreement to the contrary, put it into a condition fit for such occupation and repair all subsequent dilapidations thereof, which render it untenantable. . . .

44. CAL. CIV. CODE § 1942 (West Supp. 1972) states that:

> (a) If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of

plaintiff could not afford to make the repairs herself, nor did she wish to leave the apartment. Hence, the court based the plaintiff's right to recover on contract law which not only gave her the right to rescind the contract and vacate, but moreover, allowed her to reform the contract or recover damages for breach of the contract's implied warranty of habitability.[45]

The California Court of Appeals delineated the following criteria for the determination of the existence of an implied warranty of habitability for leased premises: (1) The materiality of the alleged breach is considered in light of the seriousness of the defect and the length of time it persists.[46] (2) Minor housing code violations alone, not affecting habitability, will not entitle the tenant to rent reduction.[47] (3) The violation must be relevant and affect the tenant's apartment or the common areas he uses.[48] (4) To recover, the tenant may not have wrongfully caused the damages.[49] (5) The tenant must give notice of the alleged defects to the landlord and allow a reasonable time for repairs to be made.[50] The court determined that in light of these criteria, the plaintiff's situation dictated that an implied warranty of habitability would be found in the lease and that the most equitable remedy would be the assessment of damages since "the tenant would not be completely absolved from the rent but would remain liable for the reasonable rental value of the premises, as determined by the trial court, for

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other conditions. This remedy shall not be available to the lessee more than once in any twelve-month period.

(b) For the purposes of this section, if a lessee acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a presumption affecting the burden of producing evidence.

See also Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), for a "repair-and-offset-the-rent" remedy based on an implied warranty of habitability and a resulting implied covenant to repair.

45. Curiously, the *Hinson* court did not even mention the California Civil Code. Instead, it quoted from *Lemle*:

> By adopting the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness, a more consistent and responsive set of remedies are available for a tenant. They are the basic contract remedies of damages, reformation, and rescission. These remedies would give the tenant a wide range of alternatives in seeking to resolve his alleged grievance.

51 Haw. 426, 436, 462 P.2d 470, 475 (1969).

46. 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); *accord,* Lemle v. Breeden, 51 Haw. 426, 436, 462 P.2d 470, 476 (1969).

47. 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); *accord,* Javins v. First National Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970).

48. 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); *accord,* Javins v. First National Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1972).

49. 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); *accord,* Javins v. First National Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970). *Javins* noted that the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action.

50. 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (Ct. App. 1972).

such time as the premises were in violation of the housing code."[51]

The *Hinson* court failed, however, to state explicitly the standard used to determine habitability. Although the court ruled that before the plaintiff would be required to pay rent, the landlord must comply with his duty to "substantially obey the housing codes and make the premises habitable,"[52] it is uncertain whether the housing code is the only standard by which habitability is to be determined. *Lemle*, upon which *Hinson* relies heavily, held that each case must turn on its own facts in determining whether a breach exists, the materiality of the breach depending on the seriousness of the defect and the length of time it persists.[53] On the other hand, *Javins* specifically says that the warranty of habitability is to be measured by the standards set out in the housing code.[54] Whether by design or merely by effect, the *Hinson* court has not limited itself to the *Javins* standard, *i.e.*, that standard set out in the housing code and relating to urban apartments. It has left the question open whether an implied warranty of habitability will be found in leases of houses without reference to the standards of habitability in a housing code.

In consideration of a final procedural point in an action by a tenant against the landlord based on a breach of warranty of habitability, *Hinson* said that the trial court may, during the pendency of the action and at the request of either party, require the tenant to make rental payments at the contract rate into the court as they become due for as long as the tenant remains in possession.[55] This "escrow" arrangement has been criticized for tying up money which could be working to repair the defects.[56] However, this criticism is limited by the practical consideration that until the litigation is over, it is often not certain who must repair and what the extent of the repairs will be. *Javins* considered the payment of rent into the court an excellent "protective procedure."[57] Not only is the landlord's interest in the rent, to the extent to which he prevails in the litigation, protected, but such an "escrow" account discourages the tenant from making "frivolous claims."[58]

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51. *Id.*
52. *Id.* at 71, 102 Cal. Rptr. at 667.
53. 51 Haw. 426, 436, 462 P.2d 470, 476 (1969).
54. 428 F.2d 1071, 1072-73 (D.C. Cir. 1970).
55. 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 666 (Ct. App. 1972).
56. Comment, *Tenants Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710, 715 (1971).
57. 428 F.2d 1071, 1083 (D.C. Cir. 1970).
58. 84 HARV. L. REV. 729, 738 (1971).

Although it has added few new concepts to the small volume of case law which has found warranties of habitability implied in lease agreements, *Hinson* has organized the existing concepts and rules into a workable scheme to provide desirable remedies for indigent apartment dwellers faced with defects in the premises arising during the lease, a situation prevalent in urban environments. The scope of *Hinson* extends beyond the *Javins'* restriction of implied warranty remedies to urban apartment leases. By repeated incorporation of the broad language of *Lemle*, it leaves open the question of whether implied warranties of habitability should be applicable to leases of rural or urban single houses for consideration by a later court dealing with a relevant fact situation. In *Hinson* the court applied the concept of the implied warranty of habitability to the best advantage of the parties, while at the same time, making certain not to preclude its extension to other circumstances, clearly implying that such an extension may be desirable.

The significance of *Hinson*, however, does not lie in the fact that it found an implied warranty of habitability in the lease agreement, since the warranty was required by statutory law.[59] The importance of the decision is that the court found the implied warranty to be based on contract principles, thereby affording the tenant a greater choice of remedies than the limited ones created by the legislature. Furthermore, by requiring the tenant, at the request of the landlord, to pay rent to the court during the pendency of the action, the court was able to protect the landlord, at least to the extent of the reasonable rental value of the premises. It is therefore submitted that both the implied warranty principle and the method in which it was utilized to meet the problems of the *Hinson* case provide a desirable and equitable remedy for similar fact situations. Whether the implied warranty of habitability based on contract principles should be extended to circumstances involving leases of such property interests as single houses was left unanswered by *Hinson*, but must be seriously considered by courts confronted with that issue.

In Pennsylvania, where caveat emptor is still the rule,[60] a tenant such as the one in *Hinson* would have recourse to the Pennsylvania Rent Withholding Act[61] for a remedy. Under the Penn-

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59. *See* note 56 and accompanying text, *supra*.
60. McAuvic v. Silas, 190 Pa. Super. 24, 151 A.2d 662 (1959).
61. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1972) states:

Notwithstanding any other provision of law, or of any agreement, whether oral or in writing, whenever the Department of Licenses and Inspections of any city of the first class, or the Department of Public Safety of any city of the second class, second class A or third class as the case may be, or any Public Health Department of any such city, or of the county in which such city is located, certifies a dwelling as unfit for human habitation, the duty of any tenant of such dwelling to pay, and the right of the landlord to collect rent shall be suspended without affecting any other terms or conditions of the landlord-tenant relationship, until the dwelling

sylvania act, a city dweller, whose apartment is certified as unfit, may withhold his rent and pay it into an escrow account for six months. If repairs are made and the premises are certified as habitable within six months, the landlord may recover the rent paid into escrow; if the apartment is not fit at the end of six months, the tenant-depositer may receive the funds from the escrow, except those funds necessary to make repairs and pay for the utilities.

The provisions of the Pennsylvania Rent Withholding Act are very similar to those provisions promulgated by the *Hinson* court: habitability is to be determined by the municipal housing authorities, rent for an unfit apartment may be withheld, and an escrow account is provided for the withheld rent. In spite of the similarities, the *Hinson* reasoning provides a better solution to this type of landlord-tenant problem in several respects. First, and most important, under the *Hinson* reasoning the lease is to be governed by contract principles, which provide tenants with the alternative remedies of rescission, reformation, or damages. This permits the tenant a greater latitude of practical remedies. Second, *Hinson* requires the tenant to pay the "reasonable rental value" for the premises while the defects exist. Under the Pennsylvania act, the landlord forfeits the rent that is in escrow if the apartment is not certified as fit within six months after it is certified as unfit. This can work an obvious inequity, especially where the landlord attempts to remedy the situation but falls short of the six-month deadline and is penalized for his attempts.[62] Finally, whereas

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is certified as fit for human habitation or until the tenancy is terminated for any reason other than nonpayment of rent. During the period when the duty to pay rent is suspended, and the tenant continues to occupy the dwelling, the rent withheld shall be deposited by the tenant in an escrow account in a bank or trust company approved by the city or county as the case may be and shall be paid to the landlord when the dwelling is certified as fit for human habitation at any time within six months from the date on which the dwelling was certified as unfit for human habitation. If, at the end of six months after the certification of a dwelling as unfit for human habitation, such dwelling has not been certified as fit for human habitation, any moneys deposited in escrow on account of continued occupancy shall be payable to the depositor, except that any funds deposited in escrow may be used, for the purpose of making such dwelling fit for human habitation and for the payment of utility services for which the landlord is obligated but which he refuses or is unable to pay. No tenant shall be evicted for any reason whatsoever while rent is deposited in escrow.

For a general discussion of this act see Clough, *Pennsylvania's Rent Withholding Law*, 73 DICK. L. REV. 583 (1968-69); Note, *Rent Withholding in Pennsylvania*, 30 U. PITT. L. REV. 148 (1968); Comment, *Substandard Housing: The New Pennsylvania Rent Withholding Act as a Solution*, 5 DUQ. L. REV. 413 (1966-67).

62. *See, e.g.*, Klein v. Allegheny County Health Department, 216 Pa. Super. 50, 261 A.2d 619 (1969), *aff'd in part, vacated in part*, 441 Pa. 1,

Hinson leaves open the question of whether implied warranties of habitability will be extended to rural areas or single unit dwellings, the Pennsylvania act restricts its remedy to first, second, and third class cities. Such an arbitrary line of demarcation leaves multi-unit apartment building dwellers and single unit dwellers in lesser populated areas, where housing is also not plentiful, subject to caveat emptor. It is submitted that the Pennsylvania legislature and courts consider the shortcomings of the present state of its landlord-tenant law and seek a more functional procedure for providing equitable remedies for both landlord and tenant.

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269 A.2d 647 (1970). After the apartment was certified as unfit, the landlord expended $1700 for repairs. But when the apartment was found to be still unfit at the end of six months, the landlord was not allowed to recover any part of the money in escrow to meet part of the expense of the repairs.

DUE PROCESS—SUMMARY REPOSSESSION AND SALE BY SECURED CREDITOR UNDER U.C.C. 9-503 AND 9-504

Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972)

Recent court decisions have made marked inroads into the field of statutory prejudgment remedies such as wage garnishment,[1] summary replevin,[2] confession of judgment,[3] landlord distraint,[4] and inn-keeper's liens.[5] Recently the statutory prejudgment remedy of summary repossession was successfully attacked in *Adams v. Egley*,[6] where the District Court for the Southern District of California[7] held that provisions 9503 and 9504 of the California Commercial Code,[8] authorizing a secured creditor to repossess and sell the collateral pledged as security, without giving the debtor notice and the opportunity for a hearing, violated the due process guarantees of the fourteenth amendment.[9]

Section 9-503 of the Uniform Commercial Code provides in part, that a secured party has, on default, the right to take possession of

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1. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

2. Fuentes v. Shevin, 407 U.S. 67 (1972); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971).

3. Swarb v. Lennox, 405 U.S. 191 (1972).

4. Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).

5. Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

6. 338 F. Supp. 614 (S.D. Cal. 1972).

7. Federal jurisdiction was granted on both federal question jurisdiction, 28 U.S.C. § 1331 (1958), and jurisdiction under the Federal Civil Rights Act, 28 U.S.C. § 1343 (1958), and 42 U.S.C. § 1983 (1958). The *Adams* court found that enactment of §§ 9-503 and 9-504 constituted sufficient state action, and that the repossessions were made "under color of state law." 338 F. Supp. 614, 618 (S.D. Cal. 1972). Defendant's theory that the taking was pursuant to a private agreement, rather than state law, was rejected based on the reasoning in Reitman v. Mulkey, 387 U.S. 369 (1967); *accord* Adickes v. Kress Co., 398 U.S. 144, 170, 203 (concurring opinion) (1970). *Contra*, Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First National Bank of Miami, 322 F. Supp. 604 (1971).

Plaintiff's request for a statutory three-judge court pursuant to 28 U.S.C. § 2281 (1958) was held inapposite since no action of either a state or local officer was sought to be restrained. 338 F. Supp. at 616; *accord*, Collins v. Viceroy Hotel Corp., 338 F. Supp. 390, 394 (N.D. Ill. 1972).

8. CAL. COMM. CODE ANN. §§ 9503, 9504 (West 1964). These sections represent the California codification of the UNIFORM COMMERCIAL CODE §§ 9-503, 9-504 (1962) (hereinafter UNIFORM COMMERCIAL CODE).

9. U.S. CONST. amend. XIV.

the collateral without judicial process.[10] Under section 9-504, the secured party may sell, lease or otherwise dispose of the collateral repossessed after default without notice if the goods are perishable, rapidly declining in price, or are of the type customarily sold on a recognized market. Disposal by the secured party is limited only by good faith and commercial reasonableness.[11]

In *Adams*, the plaintiffs borrowed $1,000, executing a promissory note and security agreement. Three vehicles were pledged as security. The security agreement provided that "the Secured Party shall have all of the rights and remedies of a Secured Party under the California Uniform Commercial Code, or other applicable law. . . ."[12] Adams subsequently fell behind in his payments and defendant Egley, acting for Southern California First National Bank, which had become a successor in interest on the note, took possession of two of the three vehicles. The two vehicles were sold by the bank at a private sale.[13]

The original assault on prejudgment takings in the commercial area occurred in *Sniadach v. Family Finance Corp.*,[14] where a Wisconsin wage garnishment statute was declared unconstitutional by the United States Supreme Court because it failed to provide the garnishee notice and a hearing prior to garnishment of the wages. In *Sniadach*, the Court noted that a summary procedure may be valid in extraordinary situations when an interest of a state or creditor needs special protection,[15] but that such interest was not presented by cases in which wages were the subject of the procedure.[16] Mr. Justice Douglas, speaking for the Court, limited the thrust of *Sniadach* by commenting that wages were "a specialized type of property presenting distinct problems in our economic system."[17] This restrictive categorization of the type of property with which the Court was concerned has led to a narrow interpretation of *Sniadach* in a number of cases.[18] However, in *Adams*, the court broadly interpreted the *Sniadach* precedent as establishing due

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10. UNIFORM COMMERCIAL CODE § 9-503 (1962).
11. UNIFORM COMMERCIAL CODE § 9-504 (1962). California has amended § 9-504 to require five days notice in the category of collateral originally exempt from notice.
12. 338 F. Supp. 614, 616 (S.D. Cal. 1972).
13. *Id. Posadas v. Star and Crescent Federal Credit Union* was joined with *Adams* on appeal to the district court. The facts in *Posadas* are substantially similar to those in *Adams* and will not be set forth.
14. 395 U.S. 337 (1969).
15. *See* Ewing v. Mytinger, 339 U.S. 594 (1950) (seizure of misbranded items for the protection of public health); Fahey v. Mallone, 332 U.S. 245 (1947) (bank take-over to preserve credit during investigation).
16. 395 U.S. 337, 339 (1969).
17. *Id.* at 340.
18. *See, e.g.*, Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969); Michaels' Jewelers v. Handy, 266 A.2d 904 (Cir. Ct. Conn. 1969).

process standards[19] applicable to all types of property which may be the subject of prejudgment taking.[20]

The defendant-creditor in *Adams* contended that repossessions under sections 9-503 and 9-504 were limited to such extraordinary situations that the summary procedures involved were not violative of due process.[21] This contention was based on the fact that sections 9-503 and 9-504 dealt only with secured transactions between contracting parties.[22] Relying on *Brunswick v. J & P, Inc.*[23] and *Fuentes v. Faircloth*,[24] the defendant argued that the contractual agreement between the parties, which authorized a summary procedure, was one of the situations in which the necessity for prior notice and a hearing could be waived.[25]

In rejecting the defendant's argument that a contractual agreement excepted summary repossession from the due process requirements of *Sniadach*, the court in *Adams* disagreed with the implica-

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19. The due process standard which *Sniadach* established requires that wages cannot be garnished without affording the wage earner notice and an opportunity to be heard prior to the garnishment of his wages, 395 U.S. 337, 338-40 (1969).

20. *See* Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Randone v. Appellate Dept., 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971); Blair v. Pitchess, 5 Cal. 2d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971); Jones Press, Inc. v. Motor Travel Service, Inc., 286 Minn. 205, 176 N.W.2d 87 (1970); Larson v. Fetherson, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

21. 338 F. Supp. 614, 619 (S.D. Cal. 1972); *e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969).

22. Adams v. Egley, 338 F. Supp. 614, 617 (S.D. Cal. 1972); *see* UNIFORM COMMERCIAL CODE § 9-503 (1962).

23. 424 F.2d 100 (10th Cir. 1970). Brunswick caused a writ of replevin to be issued by which a United States Marshal constructively delivered possession of certain bowling equipment to Brunswick. The equipment had been purchased from Brunswick by J & P, Inc. pursuant to a conditional sales agreement and promissory note, on which note J & P, Inc. was in default at the time of replevin. The equipment was sold at public auction. The court held replevin pursuant to the Oklahoma statute was not unconstitutional.

24. 317 F. Supp. 954 (S.D. Fla. 1970). The defendant Fuentes purchased a gas stove and a stereo pursuant to conditional sales contracts which provided that the seller could take back the merchandise if the buyer defaulted on any payments. Several months after Mrs. Fuentes had fallen behind in her payments the seller caused a writ of replevin to be issued and a deputy sheriff took possession of the merchandise. The district court held the Florida statute allowing summary replevin was not unconstitutional. Subsequently the United States Supreme Court, by a 4-3 decision, reversed the district court in *Fuentes v. Faircloth; see* Fuentes v. Shevin, 407 U.S. 67 (1972). For a discussion of Fuentes v. Shevin, *see* Annot., 45 A.L.R.3d 1233 (1972).

25. Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); Fuentes v. Faircloth, 317 F. Supp. 954, 958 (S.D. Fla. 1970).

tion that the debtor, by entering the contract, voluntarily consented to its provisions regarding default and thereby waived his constitutional right to prior notice and a hearing.[26] Noting the judicial presumption against waiver of a constitutional right,[27] the court in *Adams*, said that while the right to prior notice and a hearing could be waived by contracting parties, such waiver would not be valid solely by reason of the contract.[28] In contemporary commercial transactions, the use of the standard-form contracts by most sellers often places the consumer in a "take-it-or-leave-it position."[29] This occurs because the seller is either holding a monopolistic position in the market, or because all sellers use similar standard-form contracts.[30] Under these circumstances, the consumer may be forced by necessity into purchasing goods and services under contract terms over which he has no control and which he does not understand.[31]

Other court's have joined *Adams'* rejection of an alleged waiver of the constitutional right of a prior notice and hearing when the underlying transaction was based on a standard-form contract.[32] The United States Supreme Court, in *Swarb v. Lennox*,[33] found that waiver of the right to prior notice and a hearing could meet constitutional standards only if an understanding and voluntary consent on the part of the debtor existed.[34] In comparing the purported contractual waivers in *Swarb*[35] and *Adams*,[36] it should be noted that whereas the confession of judgment clause in the former decision sets out in some detail the procedure to be followed by the party confessing judgment, such is not the case with the waiver clause in *Adams*. The alleged contractual waiver in *Adams* stated only that the secured party was to have all rights and remedies provided by the California Commercial Code. Consequently, the debtor's knowledge of the fact that he is waiving constitutional

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26. Adams v. Egley, 338 F. Supp. 614, 620 (S.D. Cal. 1972); *see* Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 105 (10th Cir. 1970) (the lower court in *Fuentes* relied heavily upon the *Brunswick* decision).

27. Glasser v. United States, 315 U.S. 60 (1942); Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937).

28. 338 F. Supp. 614, 620 (S.D. Cal. 1972).

29. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629, 632 (1943).

30. *Id.*

31. *Id.*

32. Fuentes v. Shevin, 407 U.S. 67 (1972); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 281, 96 Cal. Rptr. 42, 59, 486 P.2d 1242, 1259 (1971).

33. Swarb v. Lennox, 405 U.S. 191 (1972), *aff'g* Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970). Affirmation by the Supreme Court (4-3) occurred subsequent to the decision in *Adams*. The *Adams* court relied in its decision on the district court opinion of *Swarb*.

34. 314 F. Supp. 1091 (E.D. Pa. 1970).

35. *Id.* at 1097.

36. 338 F. Supp. 614, 620 (S.D. Cal. 1972).

rights under the *Adams* clause appears far more questionable than under the clause held invalid in *Swarb*. Complementing the judicial presumption against waiver of a constitutional right,[37] with the *Swarb* requirement of an understanding and voluntary waiver,[38] the *Adams* court's finding that the alleged waiver standing by itself in a standard-form contract is ineffective, appears sound. It is submitted that the minimum requirements for a contractual provision to work an effective waiver of constitutional rights demand that clear, concise language be used in the contract, advising the debtor party precisely what rights are being waived. The procedure to be used in lieu of those constitutional rights must be set forth in a manner that can be understood by the debtor.[39] Where, as in *Adams*, the contracting parties are a corporate creditor and an individual, the requirements of the above proposition cannot realistically be fulfilled by reference to a law of which the individual probably has no knowledge. As noted by the court in *Adams*, the identity of the parties to the contract is significant. The court, pointed out that where as in *Brunswick* both parties are commercial concerns, the bargaining power of the parties is equal and waiver of the constitutional right to prior notice and hearing may be effective. However, respossession under the California statute was not limited to parties contracting from equal bargaining positions.[40]

Two other relevant considerations with regard to the identity of the parties which were not expressed in *Adams*, were recently discussed by the United States Supreme Court in *D.H. Overmyer Co. v. Frick Co.*[41] Corporate entities dealing with many contracts each day and who are generally represented by counsel, may be held to possess more knowledge of the legal consequences of contracts to which they become parties.[42] A corporate debtor may in this regard be held to have knowledge of provisions of the Uniform Commercial Code, whereas such knowledge could not be assumed when the debtor party was an individual unfamiliar with commercial dealings. The second distinction found significant in *Over-*

37. *See* note 27 *supra.*
38. 314 F. Supp. 1091, 1095 (E.D. Pa. 1970).
39. Fuentes v. Shevin, 407 U.S. 67 (1972).
40. 338 F. Supp. 614, 621 (S.D. Cal. 1972).
41. 405 U.S. 174 (1972). Defendant Frick executed a note containing a confession of judgment clause in favor of Overmyer to cover the balance owed Overmyer for installation of a refrigeration system. The Court, noting that both parties were corporate entities and that the cognovit clause was included in the note only after much bargaining by the parties, upheld the Ohio confession of judgment statute as applied to these facts.
42. *Id.* at 186.

myer, is that inclusion of a clause authorizing summary procedures may be a bargained-for part of the contract, for which the creditor has given some consideration to the debtor.[43] Although some benefit may accrue to the individual debtor if it is assumed that he receives lower prices or interest rates in return for the release of the creditor from the expense of the due process requirements of prior notice and hearing before repossession, the bargained-for-exchange aspect of such consideration would be obviated by the nature of the standard-form contract where the individual cannot exercise an option to have the waiver clause deleted.[44]

Whereas the identity of the parties cannot be held to be a "distinction without a difference as far as due process is concerned,"[45] *Adams'* characterization of the parties as corporate creditor and individual may not in itself be determinative of the knowledge and bargaining power of the parties. The facts of a given case may well show that the individual involved was fully aware of the legal consequences of the document being signed and voluntarily waived his constitutional rights.[46]

Although contractual agreement may effectively waive constitutional rights, the court in *Adams* rejected the proposition that any contractual waiver absolutely rebutted the presumption against waiver of a constitutional right. In holding sections 9-503 and 9-504 unconstitutional, the court, in *Adams*, found that while valid contractual waivers were possible, sections 9-503 and 9-504 were so broad that they encompassed contractual waivers in situations where it could not be assumed that the debtor had made an understanding and intelligent waiver of his constitutional rights.[47]

The court, in *Adams*, also found that sections 9-503 and 9-504 of the Uniform Commercial Code were not drawn narrowly enough to include in their operation only property of a nonessential nature.[48] Since *Sniadach*, courts which have expanded that precedent have relied on the reasoning that due process requirements as to wages are equally applicable to the day-to-day necessities which the wages buy.[49] Following this reasoning, the court in *Adams* noted that, as in *Brunswick*, the collateral affected by sections 9-503 and 9-504 may be of a nonessential nature, however, often the items

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43. *Id.*
44. *Cf.* Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970).
45. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970); *cf.* Fuentes v. Shevin, 407 U.S. 67 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Swarb v. Lennox, 405 U.S. 191 (1972).
46. *Compare* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) *with* Swarb v. Lennox, 405 U.S. 191 (1972).
47. 338 F. Supp. 614 (S.D. Cal. 1972).
48. *Id.* at 621.
49. Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

pledged as collateral are essential to daily living. Recently the suggestion that the requirements of due process differed depending on whether the property was determined to be essential or non-essential, was rejected in *Fuentes v. Shevin*,[50] where the United States Supreme Court said:

> [U]nder our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own rights, are 'necessary.'[51]

In *Adams*, it was held that while situations may exist where repossession and sale pursuant to Sections 9-503 and 9-504 would effect no violation of due process, the provisions were not narrowly enough drawn to encompass only those situations and were therefore unconstitutional.[52] However, in view of previous successful attacks on summary procedure,[53] the court's decision cannot be viewed as unexpected. The decision is, however, broader than previous decisions in that Sections 9-503 and 9-504 of the Uniform Commercial Code were declared unconstitutional on their face rather than determining that they presented a denial of due process with regard to the particular case at issue. The recent decision by the United States Supreme Court in *Fuentes v. Shevin*[54] corroborates the holding in *Adams*. The Court in *Fuentes*, in addition to rejecting the limitation of *Sniadach* to essential items,[55] also noted the difficulty in assuming a contractual waiver of a constitutional right where a standard-form contract was used and the parties were of unequal bargaining power.[56] The Court also recognized the power of a State to seize goods before a final judgment in order that the interest of the secured creditor be protected, but required that the creditor test his claim to the goods at a prior hearing.[57] It is submitted that the future direction of the courts will be to require legislatures to assure fair prior determination of the rights of the parties before the creditor can avail himself of a statutory prejudgment remedy.

The resultant legislative problem is that the narrow draftsmanship required to make sections 9-503 and 9-504 comply with due

50. 407 U.S. 67 (1972).
51. *Id.* at 90.
52. 338 F. Supp. 614, 621 (S.D. Cal. 1972).
53. *See* note 32 *supra.*
54. 407 U.S. 67 (1972).
55. *Id.* at 90.
56. *Id.* at 95.
57. *Id.* at 96.

process, absent the debtor's right to a prior hearing would render available remedies inapplicable to the majority of consumer sales. The logical direction for legislative action has been suggested in *Fuentes*, where the Court said, "Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing, . . ."[58] The purpose of such a hearing would not be to make a final determination of the rights of the respective parties, but rather to establish the validity or probable validity of the creditor's claim, before the debtor can be deprived of his interest in the property.[59] The reason for requiring a hearing is to assure that the debtor is not unfairly or mistakenly deprived of his interest in the property.[60] Whereas the method of accomplishing this goal may vary, it is essential that the debtor have an opportunity to be heard and that the merits of both the creditor's and debtor's contentions be weighed by an impartial party. It is submitted that legislation should require the creditor to submit his claim for summary repossession to an impartial party, who would notify the debtor when the claim was to be heard and inform the debtor of his rights to contest. Upon hearing the claims of both parties, if the impartial party decided the creditor's rights to the property in question outweighed those of the debtor, the creditor could proceed to take back the property. Although this procedure would add to the cost of the creditor's remedy, it would provide the debtor with the protection required by the fourteenth amendment.

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58. *Id.* at 97.
59. 395 U.S. 337, 343 (1969) (Harlan, J., concurring).
60. 407 U.S. 67, 97 (1972).

TORTS—CONTRIBUTORY NEGLIGENCE MUST BE A PROXIMATE CAUSE OF PLAINTIFF'S INJURY IN ORDER TO BAR HIS RECOVERY

McCay v. Philadelphia Electric Co.,
447 Pa. 490, 291 A.2d 759 (1972).

Prior to *McCay v. Philadelphia Electric Co.*,[1] there had existed two conflicting lines of Pennsylvania case law dealing with the causal relationship between a plaintiff's negligence and his injury, required to constitute contributory negligence. One line of cases[2] held that a plaintiff could not recover "if his negligence contributed in any degree, however slight, to the injury."[3] This meant that even if the plaintiff's injury would have occurred without his negligence, *any* failure to use reasonable care on his part could still be deemed to have contributed in a slight degree thereby barring his recovery. The opposing rationale[4] held that a plaintiff's negligence had to be a "proximate cause"[5] of his injury in order to defeat his suit for damages against a negligent defendant. Under this theory the plaintiff's negligence had to be a *substantial factor*[6]

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1. 447 Pa. 490, 291 A.2d 759 (1972).

2. *See* O'Neill v. United States, 411 F.2d 139, 141 (3d Cir. 1969); Getz v. Robinson, 232 F. Supp. 763, 766 (W.D. Pa. 1964); Moore v. United States, 217 F. Supp. 289, 297 (E.D. Pa. 1963); Middleton v. Glenn, 393 Pa. 360, 363, 143 A.2d 14, 16 (1958); Crane v. Neal 389 Pa. 329, 332-33, 132 A.2d 675, 677-78 (1957); Ulmer v. Hamilton, 383 Pa. 398, 403, 119 A.2d 266, 268-69 (1956); Grimes v. Yellow Cab Co., 344 Pa. 298, 304, 25 A.2d 294, 296 (1942); Goff v. Borough of College Hill, 299 Pa. 343, 347, 149 A. 477, 479 (1930); Monogahela City v. Fisher, 111 Pa. 9, 14, 2 A. 87, 89 (1886).

3. Crane v. Neal, 389 Pa. 329, 332-33, 132 A.2d 675, 677 (1957).

4. *See* Cebulskie v. Lehigh Valley R.R. Co., 441 Pa. 230, 233, 272 A.2d 171, 173 (1971); Argo v. Goodstein, 438 Pa. 468, 481, 265 A.2d 783, 789 (1970); Hamilton v. Fean, 422 Pa. 373, 378, 221 A.2d 309, 312 (1966); Geelen v. Pennsylvania R.R. Co., 400 Pa. 240, 248, 161 A.2d 595, 600 (1960); Thompson v. Goldman, 382 Pa. 277, 280, 114 A.2d 160, 162 (1955); Kovalish v. Smith, 357 Pa. 219, 222, 53 A.2d 534, 535 (1947); Weir v. Haverford Elec. Light Co., 221 Pa. 611, 617, 70 A. 874, 876 (1908); Thirteenth & Fifteenth St. Passenger Ry. Co. v. Boudrou, 92 Pa. 475, 479 (1880).

5. The term "proximate cause" is used herein as being synonymous with the term "legal cause." Despite the fact that courts persist in using the former, the latter is preferred for purposes of clarity. For that reason it is used herein. *See* note 18 and accompanying text *infra* for Prosser's opinion of proximate cause. *See* note 16 and accompanying text *infra* for a definition of legal cause.

6. Restatement (Second) of Torts, §§ 432(1) and 433 (1965), define substantial factor.

> Section 432(1): [t]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negli-

in causing his injury.[7] The inconsistency between these diametrically opposed precedents was resolved in *McCay*, where the Pennsylvania Supreme Court adopted the proximate cause test[8] and specifically overruled *Crane v. Neal*,[9] which had embraced the "slightest degree" test.

In *McCay*, plaintiffs Joseph and Jean McCay sued defendant Philadelphia Electric Co. for losses sutained as a result of a rear-end automobile collision allegedly caused solely by the negligence of the defendant's employee.[10] The trial judge charged the jury as follows:

> If a plaintiff was guilty of negligence which contributed to the happening of his own injury in any degree, however slight, it may have been, he cannot prevail in a suit for damages arising from that accident. The test is whether the act or acts alleged as constituting negligence contributed in any degree to the production of the injury.[11]

The jury returned a verdict for the defendant.

On appeal to the Pennsylvania Supreme Court, the McCays contended that the trial court's instruction on contributory negligence erroneously omitted reference to the requirement[12] that, "[t]he contributory negligence of the plaintiff contribute to the happening of the accident in a proximate way."[13] The *McCay* court affirmed the trial judge's charge, stating that, "[a]lthough a portion of the charge could possibly be interpreted to suggest an adherence to the erroneous 'slightest degree' test, we believe that when reviewed in its entirety the trial court's charge to the jury on contributory negligence was in compliance with Pennsylvania

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gent.

Section 433: The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or a series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

7. Harrison v. Nichols, 219 Pa. Super. 428, 432, 281 A.2d 696, 698-99 (1971).

8. 447 Pa. 490, 495, 291 A.2d 759, 761 (1972).

9. 389 Pa. 329, 332-33, 132 A.2d 675, 677 (1957).

10. Record, vol. 1, at 141a-159a, McCay v. Philadelphia Elec. Co., 447 Pa. 490, 291 A.2d 759 (1972). There was evidence admitted over appellants' counsel's objection that the "injury" was a pre-existing condition.

11. 447 Pa. 490, 495-96, 291 A.2d 759, 762 (1972).

12. Cebulskie v. Lehigh Valley R.R. Co., 441 Pa. 230, 233, 272 A.2d 171, 173 (1971); Argo v. Goodstein, 438 Pa. 468, 481, 265 A.2d 783, 789 (1970).

13. Brief for Appellant at 23-26, McCay v. Philadelphia Elec. Co., 447 Pa. 490, 291 A.2d 759 (1972).

law."[14] Strictly speaking this was all that the court needed to say to resolve the issue before it. However, the supreme court seized the opportunity to resolve the century old question regarding the correct test of contributory negligence in Pennsylvania.

Before discussing the supreme court holding, a brief historical analysis of the peculiar development of contributory negligence in Pennsylvania is necessary. The concept of contributory negligence is a relatively simple one, being well established in American jurisprudence. It is rather uniformly defined as conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.[15] Crucial to an understanding of this doctrine is an explanation of *legal cause*. A plaintiff's negligence is a legally contributing cause of his injuries if, "it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it."[16] The standard of conduct required of the plaintiff is that of a reasonable man under like circumstances.[17] Thus, contributory negligence is failure of the plaintiff to use reasonable care for the protection of his own interests. The concept becomes extremely confusing when the causal relation between the plaintiff's negligence and his harm is described in terms of "proximate cause" rather than legal cause. This substitution causes confusion because, as Prosser points out, "[t]here is perhaps nothing in the entire field of law which has called forth more disparagement [than 'proximate cause'], or upon which the opinions are in such a welter of confusion."[18]

Two contradictory tests governing recovery under contributory negligence sprang from this "welter of confusion" in Pennsylvania and existed side by side for over one hundred years. One line of reasoning held that a plaintiff was guilty of contributory negligence and could not recover if his negligence contributed in any degree, however slight, to his injury.[19] In other words, a plaintiff's contributory negligence did not have to be a "legal cause" of his injury. The opposing rationale required that a plaintiff's

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14. 447 Pa. 490, 495, 291 A.2d 759, 762 (1972).

15. *E.g.*, RESTATEMENT (SECOND) OF TORTS, § 463 (1965); 2 HARPER AND JAMES, THE LAW OF TORTS, § 22.10 (1956); W. PROSSER, LAW OF TORTS, § 65 (4th ed. 1971) [hereinafter cited as PROSSER].

16. RESTATEMENT (SECOND) OF TORTS, § 465(1) (1965).

17. Mroz v. Dravo Corp., 429 F.2d 1156, 1163 (3d Cir. 1970); Powell v. T. Bruce Campbell Constr. Co., 412 Pa. 456, 459, 194 A.2d 883, 884 (1963); RESTATEMENT (SECOND) OF TORTS, § 464(1) (1965).

18. PROSSER at 236.

19. *See* note 2 *supra*.

recovery be denied only if his negligence was the "legal cause" of his injury.[20]

It is submitted that these divergent theories were able to coexist due to the lack of a concise definition of legal cause as it delineates the relation between the plaintiff's negligence and his injury under the doctrine of contributory negligence. The resulting misunderstanding was exacerbated by the imprecise language, applicable to either line of reasoning, often used by opinion writers.[21] In *Creed v. Pennsylvania Railroad Co.*, the Pennsylvania Supreme Court held that, "[t]he test for contributory negligence is whether the act constituting the negligence contributed in any degree to the production of the injury complained of."[22] In several other cases[23] the supreme court ruled that the word "material" could not be used to qualify the degree of negligence required to defeat a plaintiff. The basis for this rationale was an attempt to avoid a comparison between the negligence of the plaintiff and that of the defendant. *Creed*, in an attempt to indicate that Pennsylvania had not adopted comparative negligence, included the words "in any degree."[24] Indicative of the confusion resulting from the language in *Creed* is the fact that it has been cited in support of each of the two conflicting lines of reasoning.[25]

In *Crane v. Neal*, Mr. Chief Justice Bell attempted to authoritatively define the required causal relation between a plaintiff's negligence and his injury necessary to bar his recovery under contributory negligence. Ostensibly following well established Pennsylvania law, the court stated: "[t]here is not the slightest doubt that a plaintiff is guilty of contributory negligence and cannot recover if his negligence contributed in any degree, however

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20. *See* note 4 *supra*.

21. *E.g.*, McFadden v. Pennzoil Co., 341 Pa. 433, 436, 19 A.2d 370, 372 (1941); Robinson v. American Ice Co., 292 Pa. 366, 369, 141 A. 244, 245 (1928); Creed v. Pennsylvania R.R. Co., 86 Pa. 139, 145 (1878); *cf.* Goff v. Borough of College Hill, 299 Pa. 343, 347, 149 A. 77, 79 (1930) which clearly uses the "slightest degree" test, but relies on cases from each of the opposing lines of cases.

22. 86 Pa. 139, 145 (1878).

23. Monogahela City v. Fisher, 111 Pa. 9, 2 A. 87 (1886); Oil City Fuel v. Boundy, 122 Pa. 449, 15 A. 865 (1888); Mattimore v. Erie City, 144 Pa. 14, 22 A. 817 (1891).

24. *Accord*, PROSSER at 421.

25. *Compare* Thirteenth & Fifteenth St. Passenger Ry. Co. v. Boudrou, 92 Pa. 475, 480 (1880) (plaintiff's negligence must be a juridical cause of his injury), *with* Crane v. Neal, 389 Pa. 329, 333, 132 A. 2d 675, 678 (1957) (plaintiff's negligence need only contribute in any degree, however slight). *Accord*, McFadden v. Pennzoil Co., 341 Pa. 433, 19 A.2d 370 (1941). In *McFadden* the Pennsylvania Supreme Court applied the *Creed* criteria for contributory negligence, but thereupon added that, "in order to defeat recovery, the injured person's negligence must have been a juridical [legal] cause of the injury and not simply a condition of its occurrence." *Id.* at 436, 19 A.2d at 372. The error in juxtaposing these tests is obvious, since the first requires only that a plaintiff's negligence contribute in *any* degree whereas the second requires *substantial* contribution.

slight, to the injury."[26] Prosser criticizes the "slightest degree" test in *Crane* as "nothing more than a confusion of words, which fails to distinguish slight negligence from slight contribution, and what is really meant is that the plaintiff's negligence can be a defense no matter how slight his departure from ordinary standards of conduct."[27] Under the "slightest degree" test any insignificant contribution by the plaintiff to the cause in fact of his injury bars his recovery. This standard places no restrictions on the plaintiff's disability and any jury willing to trace the chain of causation far enough will eventually discover *some* negligence on the plaintiff's part that could bar his recovery.

The *Crane* court purposely refused to require that a plaintiff's negligence be a legal cause of his injury. This is evidenced by the fact that Mr. Chief Justice Bell relied on the "contributed in any degree" language of *McFadden v. Pennzoil Co.*,[28] and chose to ignore the language pertaining to legal cause.[29] The reason for this exclusion is that the *Crane* majority felt that the "slightest degree" test was in conflict with the concept of proximate cause, as indicated by the statement, "[c]ourts must be careful not to confuse or equate contributory negligence ['slightest degree' test] with proximate cause."[30] However, as pointed out in *Cebulskie v. Lehigh Valley Railroad Co.*,[31] the recognition of such conflict confuses the meaning of proximate cause since, "proximate cause does not refer to a degree of negligence. . . . It describes a kind of causation, the kind to which legal responsibility attaches."[32] *Crane's* failure to apply the proximate cause standard to the plaintiff's negligence was specifically overruled by the *McCay* decision.[33]

During its fifteen year lifetime *Crane v. Neal* was cited often in Pennsylvania,[34] but was never specifically held controlling. Fur-

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26. 389 Pa. 329, 332-33, 132 A.2d 675, 677 (1957).
27. PROSSER at 421.
28. 341 Pa. 433, 436, 19 A.2d 370, 372 (1941). *See* note 25 *supra.*
29. Crane v. Neal, 389 Pa. 329, 333, 132 A.2d 675, 677 (1957). Justice Musmanno, in his provident dissent, pointed out the fallacy in the court's logic by citing the proximate cause language of *McFadden. Id.* at 337, 132 A.2d at 680. *See* Kasanovich v. George, 348 Pa. 199, 202, 34 A.2d 523, 525 (1943) and Weir v. Haverford Elec. Light Co., 221 Pa. 611, 617, 70 A. 874, 876 (1908) (Both opinions were cited by Chief Justice Bell in support of his position, again ignoring language requiring a plaintiff's negligence to be a proximate cause of his injury to bar his recovery).
30. 389 Pa. 329, 333, 132 A.2d 675, 677 (1957).
31. 441 Pa. 230, 234, 272 A.2d 171, 173 (1971).
32. *Id.*
33. 447 Pa. 490, 495, 291 A.2d 759, 762 (1972).
34. *See, e.g.*, O'Neill v. United States, 411 F.2d 139, 141 (3d Cir. 1969); Musi v. DeSarro, 370 F.2d 113, 114 (3d Cir. 1966); Getz v. Robinson, 232 F. Supp. 763, 766 (W.D. Pa. 1964); Moore v. United States, 217 F. Supp.

thermore, although one other jurisdiction retains the "slightest degree" test,[35] it has never cited *Crane*. Of greater significance is the fact that the Pennsylvania Supreme Court had ignored its holding in *Crane* on six separate occasions[36] by requiring a plaintiff's negligence to be a proximate cause of his injury in order to bar his recovery under contributory negligence. Two of these cases, *Argo v. Goodstein*[37] and *Cebulskie v. Lehigh Valley Railroad Co.*,[38] substantially overruled *Crane v. Neal* precipitating the *McCay* decision.

In *Argo v. Goodstein*, the Pennsylvania Supreme Court ruled that the trial judge had "correctly charged that to bar recovery, a plaintiff's conduct must be a *proximate cause* of the happening of his own injury in any degree, however slight."[39] The court's retention of the "slightest degree" language does not temper the fact that the court used a proximate cause test, giving no credence to *Crane v. Neal*. Similarly, in *Cebulskie v. Lehigh Valley Railroad Co.*, the court, "summarizing" Pennsylvania law, stated, "a plaintiff cannot recover if his own negligence, however slight, contributes to the happening of the accident in a proximate way, *i.e.*, the acci-

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289, 297 (E.D. Pa. 1963); Middleton v. Glenn, 393 Pa. 360, 363, 143 A.2d 14, 16 (1958); Matteo v. Sharon Hills Lanes, 216 Pa. Super. 188, 191, 263 A.2d 910, 912 (1970); Griner v. Greco, 190 Pa. Super. 316, 318, 154 A.2d 294, 295 (1959).

35. Langevin v. Gilman, 121 Vt. 440, 159 A.2d 340 (1960). PROSSER at 421 n.44 erroneously cites three other jurisdictions as retaining the same standard. Atchison v. Reter, 245 Iowa 1005, 64 N.W.2d 923 (1954) (cited by Prosser) was impliedly overruled by Schultz v. Gosselink, 260 Iowa 115, 148 N.W.2d 434 (1967) where the court upheld the validity of IOWA CODE § 619.17 (1966) which requires that a defendant prove a plaintiff's negligence was a proximate cause of the injury or damage to defeat his recovery. Silva v. Waldie, 42 N.M. 514, 82 P.2d 282 (1938) (cited by Prosser) requires that a plaintiff's negligence contribute proximately to the injury (proximately meaning substantially). The court also cites RESTATEMENT OF TORTS, §§ 463 and 465 (1939). Both these facts indicate that the jurisdiction does not employ the "slightest degree" test. Keck v. Pozorski, 135 Ind. App. 192, 191 N.E.2d 325 (1963) (cited by Prosser) defined contributory negligence as any negligence on the part of the plaintiff proximately contributing to the injury. The requirement of a proximate contribution precludes the "slightest degree" test.

36. Koelle v. Philadelphia Elec. Co., 443 Pa. 35, 42, 277 A.2d 350, 354 (1971) (Chief Justice Bell, author of *Crane v. Neal*, concurred in the result-Justice Musmanno was no longer on the court); Cebulskie v. Lehigh Valley R.R. Co., 441 Pa. 230, 233, 272 A.2d 171, 173 (1971) (Chief Justice Bell concurred in the result-Justice Musmanno was no longer on the court); Argo v. Goodstein, 438 Pa. 468, 481, 265 A.2d 783, 789 (1970) (Chief Justice Bell voted with the majority-Justice Musmanno was no longer on the court); Hamilton v. Fean, 422 Pa. 373, 378, 221 A.2d 309, 312 (1966) (Chief Justice Bell dissented-Justice Musmanno wrote the opinion); Brazel v. Buchanan, 404 Pa. 188, 193, 171 A.2d 151, 154 (1961) (Chief Justice Bell dissented-Justice Musmanno wrote the opinion); Geelen v. Pennsylvania R.R. Co., 400 Pa. 240, 248, 161 A.2d 595, 600 (1960) (Chief Justice Bell concurred in the result-Justice Musmanno voted with the majority).

37. 438 Pa. 468, 265 A.2d 783 (1970).

38. 441 Pa. 230, 272 A.2d 171 (1971).

39. 438 Pa. 468, 265 A.2d 783, 789 (1970) (emphasis added).

dent was the result of one of the risks, the creation of which had caused plaintiff's conduct to be labeled negligent."[40] Although the court's holding was diametrically opposed to the *Crane* "slightest degree" test, it was unable to overrule *Crane* since only three justices concurred with the rationale of the majority opinion.[41]

The *McCay* court took the final step declaring that, "[t]o eliminate any further confusion in this area we specifically overrule *Crane v. Neal*."[42] However, the practical effect of *Cebulskie's* rejection of the *Crane* test is evidenced by *McCay's* heavy reliance upon *Cebulskie*. Mr. Justice Nix, speaking for the *McCay* court, reiterated the *Cebulskie* holding when he stated, "a plaintiff cannot recover if his own negligence, however slight, contributes to the happening of the accident in a proximate way."[43] This test of contributory negligence is easily grasped and leaves little room for confusion. It is apparent that the words "however slight" are meant to modify negligence. This avoids the embroglio of the "slightest degree" test's failure to distinguish between slight negligence and slight contribution.[44] At the same time, it reaffirms Pennsylvania's long standing refusal to adopt any form of comparative negligence,[45] in that slight negligence can still bar the plaintiff's recovery.[46]

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40. 441 Pa. 230, 233, 272 A.2d 171, 173 (1971). The last half of the above quotation (the "i.e. clause") is merely an adaptation of the RESTATEMENT (SECOND) OF TORTS, § 468 (1965):

> The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar his recovery unless his harm results from one of the hazards which made his conduct negligent.

41. Cebulskie v. Lehigh Valley R.R. Co., 441 Pa. 230, 272 A.2d 171 (1971).

42. 447 Pa. 490, 495, 291 A.2d 759, 762 (1972) (Chief Justice Bell was no longer on the court).

43. *Id.* (The court dropped the "i.e. clause" of the *Cebulskie v. Lehigh Valley R. R. Co.* test. See note 40 and accompanying text *supra* for a discussion of the "i.e. clause").

44. *See* note 27 and accompanying text *supra* for a discussion of the distinction between slight negligence and slight contribution.

45. *Cebulskie* and Kasanovich v. George, 348 Pa. 199, 202, 34 A.2d 523, 525 (1943) both cite Weir v. Haverford Elec. Light Co., 221 Pa. 611, 70 A. 874 (1908) as having long ago established Pennsylvania's positon in regard to comparative negligence. *Weir* held:

> The doctrine of comparative negligence has not been recognized in our state. Any negligence on the part of a plaintiff that contributes to, and is the proximate cause of his injury, defeats his action. There can be no balancing or matching of degrees of negligence.

Id. at 617, 70 A. at 876.

46. Walters v. Char-Mar, Inc., 220 Pa. Super. 79, 83, 284 A.2d 139, 142 (1971).

Crucial to the test explicated by *McCay*, however, is the definition of the term "in a proximate way," since it determines how the plaintiff's negligence must relate to the causation of his injury. The court in its discussion of this point stated that:

> The rules which determine the causal relation between the plaintiff's negligence and the injury are the same as those determining the causal relation between defendant's negligent conduct and the injury sustained by others. . . .[47] In both instances it is necessary to find that the negligence was the proximate cause of the accident. . . . If the plaintiff's negligence was not a proximate cause it will not bar his recovery.[48]

The question then becomes: What is Pennsylvania's definition of proximate cause?

In *Whitner v. Lojeski*[49] the Pennsylvania Supreme Court attempted to abandon[50] the term "proximate cause" in favor of "legal cause" as defined in the Restatement (Second) of Torts section 431.[51] Incorporation of the *Whitner* definition of legal cause into the contributory negligence standard of *McCay* results in section 465(1) of the Restatement (Second) of Torts. This section states:

> The plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his liability for it.[52]

Perhaps unknowingly the *Whitner* court has adopted section 465(1) as Pennsylvania law. It should be noted that only two justices on the court agreed with the reasoning of the opinion, with the other four concurring in the result only. However, the conclusion that Pennsylvania has, in effect, adopted section 465(1), is sup-

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47. RESTATEMENT (SECOND) OF TORTS, § 465(2) (1965). (Not acknowledged as such by the court).

48. 447 Pa. 490, 494, 291 A.2d 759, 761 (1972).

49. 437 Pa. 448, 458, 263 A.2d 889, 894 (1970).

50. *Id.* *Whitner* is still valid law, although the supreme court itself does not follow its precise language preferring the term "proximate cause" to "legal cause." *See, e.g.*, McCay v. Philadelphia Elec. Co., 447 Pa. 490, 495, 291 A.2d 759, 762 (1972); Koelle v. Philadelphia Elec. Co., 443 Pa. 35, 42, 277 A.2d 350, 354 (1971); Cebulskie v. Lehigh Valley R.R. Co., 441 Pa. 230, 233, 272 A.2d 171, 173 (1971); Argo v. Goodstein, 438 Pa. 468, 481, 265 A.2d 783, 789 (1970); Harrison v. Nichols, 219 Pa. Super. 428, 432, 281 A.2d 696, 698 (1971).

51. RESTATEMENT (SECOND) OF TORTS, § 431 (1965):

> The actor's negligent conduct is a legal cause of harm to another if:
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

52. RESTATEMENT (SECOND) OF TORTS, § 465(1) (1965). *See* Justice O'Connell's concurring opinion in Dewey v. A.F. Klavness & Co., 233 Ore. 515, 379 P.2d 560 (1963), for an excellent application of section 465(1) to a contributory negligence case.

ported by the fact that a federal court[53] has interpreted *Whitner v. Lojeski* as adopting the entire section on legal cause of the Restatement (Second) of Torts (sections 430-62) as the law of Pennsylvania. Since sections 462 and 465 are identical, it could be inferred that the later section was also adopted. On the other hand, section 465 was cited by counsel for the plaintiffs in both *Cebulskie v. Lehigh Valley Railroad Co.*[54] and *McCay*,[55] and the court chose not to cite the Restatement in support of either decision. However, the extensive quotation of section 465(2) in *McCay* without citation,[56] indicates that the substance of the Restatement is the law[57] despite the court's inexplicable reluctance to expressly incorporate it.

Even if section 464 of the Restatement (Second) of Torts is not expressly adopted, the *McCay* decision indisputably requires that a plaintiff's negligence be the proximate cause of his injury before it will bar his recovery under contributory negligence. This result, when coupled with the definition of proximate cause in *Whit-*

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53. Frankel v. Lull Engineering Co., 334 F. Supp. 913, 925 (E.D. Pa. 1971).

54. Brief for Appellee at 16, 21, Cebulskie v. Lehigh Valley R.R. Co., 441 Pa. 230, 272 A.2d 171 (1971).

55. Brief for Appellant at 26, McCay v. Philadelphia Elec. Co., 447 Pa. 490, 291 A.2d 759 (1972).

56. *See* note 47 and accompanying text *supra*.

57. The other sections of the Restatement (Second) of Torts defining the key words in the *McCay* test have been cited and relied upon by the Pennsylvania Supreme Court in the past. RESTATEMENT (SECOND) OF TORTS, § 463 (1965):

> *Contributory negligence* is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.

E.g., Good v. City of Pittsburgh, 382 Pa. 255, 261-62, 114 A.2d 101, 104 (1955); Thompson v. Goldman, 382 Pa. 277, 280, 114 A.2d 160, 162 (1955); Kovalish v. Smith, 357 Pa. 219, 222, 53 A.2d 534, 535 (1947).

RESTATEMENT (SECOND) OF TORTS, § 431 (1965):

> The actor's negligent conduct is a *legal cause* of harm to another if:
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

RESTATEMENT (SECOND) OF TORTS, § 432(1) (1965):

> The actor's negligent conduct is not a *substantial factor* in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

E.g., Majors v. Brodhead Hotel, 416 Pa. 265, 271, 205 A.2d 873, 877 (1965); Carter v. United Novelty & Premium Co., 389 Pa. 198, 204, 132 A.2d 202, 206 (1957); Simon v. Hudson Coal Co., 350 Pa. 82, 85, 38 A.2d 259, 261 (1944).

The logical culmination of the adaptation of §§ 463, 431, and 432, especially in light of *Whitner v. Lojeski*, is the adoption of § 465.

ner, substantially clarifies Pennsylvania law. Under *Crane v. Neal*, any amount of negligence, however remote, on the part of the plaintiff was sufficient to bar his recovery. Therefore, a plaintiff's recovery was dependent upon the predilection of the jury to search for such negligence. Now, under the *McCay* proximate cause test, a plaintiff's negligence must be a substantial factor[58] in the causation of his injury before it will bar his recovery.[59] The primary impact of this new test will be on jury charges relating to contributory negligence. Under the *McCay* doctrine the jury must be instructed to determine whether the plaintiff's negligence was a legal cause of his injury, *i.e.*, was it a substantial factor in the cause in fact of his injury. However, in affirming the lower court's jury charge, the *McCay* court failed to apply its proximate cause standard. The trial judge charged that:

> If a plaintiff was guilty of negligence which contributed to the happening of his own injury in any degree, however slight, it may have been, he cannot prevail in a suit for damages arising from that accident.[60]

This is simply a reiteration of the *Crane* "slightest degree" test, as the jury was not instructed to determine whether the plaintiff's negligence was a legal cause of his injury.

The apparent intent of the Pennsylvania Supreme Court in *McCay v. Philadelphia Electric Co.* was to unequivocably terminate the coexistence of over one hundred years of conflicting tests of contributory negligence. The adoption of the proximate cause test aligns Pennsylvania with the vast majority of the jurisdictions in the United States and alleviates the harsh limitation imposed on a plaintiff's recovery under the *Crane v. Neal* "slightest degree" test. However, the affirmation of the lower court's clearly erroneous jury charge undermines the authoritative impact of the *McCay* decision.

JOHN C. PHILLIPS, JR.

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58. *See* note 6 *supra* for the definition of substantial factor.
59. Harrison v. Nichols, 219 Pa. Super. 428, 432, 281 A.2d 696, 698 (1971).
60. 447 Pa. 490, 495, 291 A.2d 759, 762 (1972).